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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PHILIP C. BODENSTAB, M.D., PETITIONERS

v.

COUNTY OF COOK, LACY L. THOMAS, AND BRADLEY LANGER, M.D.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

GLENN R. GAFFNEY
Counsel of Record
Gaffney & Gaffney
1771 Bloomingdale Road
Glendale Heights, IL 60139
(630)462-1200

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

1. Did the district judge's *sua sponte* entry of summary judgment against petitioner without giving him the opportunity to respond to respondents' Rule 56 materials deny him due process?

2. Have the federal courts below misapplied summary judgment procedure by deciding against petitioner crucial fact questions about whether his free speech was protected activity, whether he committed misconduct justifying discharge, whether respondents' investigation was fair and whether petitioner violated hospital policy?

3. Did the employer deny petitioner due process when it discharged him without providing a *Laudermill* hearing required by hospital by-laws, depriving him of notice of evidence against him or an opportunity to marshal his own evidence, then conducting a coercive, one-sided hearing which produced a fabricated report engineered to justify his discharge?

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The published opinion of the Court of Appeals for the Seventh Circuit in *Philip C. Bodenstab, M.D. v. County of Cook, Lacy L. Thomas and Bradley Langer, M.D.*, C.A. No. 08-1450, dated June 22, 2009, and reported at 569 F.3d 651(7th. Cir. 2009), affirming the district court's grant of summary judgment in favor of respondents, is set forth in the Appendix hereto(App. 1-24).

The published opinion of the U.S. District Court for the Northern District of Illinois, Hibbler, J., in *Philip C. Bodenstab, M.D. v. County of Cook, Lacy L. Thomas and Bradley Langer, M.D.*, C.A. No. 05-C-281, dated January 28, 2008, and reported at 539 F. Supp. 2d 1009(N.D. Ill. 2008), granting summary judgment in favor of respondents, is set forth in the Appendix hereto(App. 25-49).

The unpublished Order of the United States Court of Appeals for the Seventh Circuit in *Philip C. Bodenstab, M.D. v. County of Cook, Lacy L. Thomas and Bradley Langer, M.D.*, C.A. No. 08-1450, filed July 16, 2009, denying the petitioner's petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App. 50).

The unpublished report of the Hearing Appeal Officer Richard J. Krakowski of the Bureau of Human Resources of Cook County, dated November 3, 2005, denying petitioner's appeal and concluding that petitioner was terminated for cause, is set forth in the Appendix hereto(App. 51-61).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the District Court grant of summary judgment was entered on June 22, 2009(App. 1-24). Its further order denying petitioner's timely filed petition for panel rehearing or for rehearing *en banc* was filed and decided on July 16, 2009(App. 50).

This petition for writ of certiorari is filed within ninety (90) days of July 16, 2009. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law...abridging the freedom of speech....

United States Constitution, Amendment V:

> ...nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.....

Civil Rights Act–42 U.S.C. Section 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 1:

> [The federal rules of civil procedure] ...shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 12(d):

> **Result of Presenting Matters Outside the Pleadings.**
>
> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 56(c), (d)(1) and (e)(2):

(c). Serving the Motion; Proceedings.

....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court...should then issue an order specifying what facts—including items of damages or other relief----are not genuinely at issue....

(e)(2). Affidavits; Further Testimony.

....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule---- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT

Petitioner Philip C. Bodenstab, M.D.("petitioner") is a board certified physician in internal medicine, pulmonary medicine and anesthesiology. His license to practice medicine has never been suspended or revoked. In May of 1993, petitioner was appointed to the medical staff as an attending physician at Cook County Hospital in Chicago, Illinois, an entity owned by respondent Cook County ("respondent" or "Cook County") and now the John H. Stroger, Jr. Hospital ("the Hospital")(App. 2).

During his tenure as an attending physician and anesthesiologist, petitioner reported to the Hospital's management as well as to one member of the Cook County Board of Commissioners, various lapses in patient care by Hospital staff, misconduct by surgeons, "ghost surgeries," illegal work rules and other oversights and misconduct by Hospital doctors(App. 12).

In February of 2002, petitioner telephoned a friend and former colleague, Ms. Jennifer Wengeler of Seattle, Washington, and allegedly told her that if he learned that the lesion on his lip had metastasized, he would kill the ex-chief of the Hospital's Anesthesiology Department and some of his co-workers (App. 2).

On February 24 and 25, 2002, Wengeler contacted the Chicago Police Department as well as the Seattle Field Office of the FBI about petitioner's statements (*Id.*). These entities as well as the Hospital Police Department interviewed petitioner on March 8, 2002 (*Id.*). During this interview, petitioner denied

making any threats against Hospital personnel and stated that he was not a violent person; but at the end of the interview, petitioner was advised that he should contact the authorities if he had thoughts about harming anyone and that they would find him appropriate help. After the interview, the Hospital Police Department's investigation was suspended with no findings being made and petitioner reported to work without restrictions.

Thereafter petitioner continued to practice medicine under his normal schedule without any confrontations or other adverse incidents with patients or Hospital personnel. He also saw the Hospital's Chairman of the Department of Psychiatry (Dr. Deepak Kapoor) and again petitioner denied that he harbored any violent intentions towards anyone at the Hospital. On March 14, 2002, however, the Hospital's Medical Director, respondent Dr. Bradley Langer ("Langer" or "respondent"), having received Dr. Kapoor's report that petitioner's anger was a concern and that the medication he was taking probably contributed to his paranoid thinking, suspended petitioner from work at the Hospital with pay (*Id.*). Langer's written notice to petitioner admitted that he (Langer) possessed "no specific knowledge of the validity of the information which occasioned this investigation" but he nonetheless suspended petitioner.

Upon Langer's request, petitioner agreed to an extended psychiatric evaluation at the Professional Renewal Center ("PRC") in Lawrence, Kansas (App. 2-3). Petitioner, having never before been treated for any psychological condition, completed the five-day multidisciplinary assessment at PRC on August 23,

2002(App. 3). In his report,PRC's program director Scott Stacy Psy. D., noted that petitioner did not deny having a conversation with Wengeler about his concerns at the Hospital; but he now realized that his words which Wengeler construed as a threat were in reality "a bad joke that went awry during a very troubling and difficult time in his life." PRC's testing indicated that petitioner was "currently in the throes of a mild to moderate psychotic episode" but that the medications he was taking for his tuberculosis could potentially cause psychotic-like symptoms and that it was possible that some of petitioner's erratic behavior could be attributed to this medication's side effects.

While PRC concluded that petitioner was impaired to some extent, the danger he presented to himself or others was "low," the lowest of all possible ratings. It recommended that it would be prudent to monitor him closely "until a more trusting and collaborative alliance could be built." Petitioner thereupon on August 26, 2002, elected to participate in PRC's intensive day treatment program (*Id.*). Subsequently, on October 10, 2002, respondent Cook County notified petitioner that it was lifting his paid suspension but that he could not return to work and that if he intended to do so, he must first contact the Hospital's Employee Health Services and obtain approval of the Hospital's Chief Operating Officer, respondent Lacy L. Thomas ("respondent" or "Thomas")(*Id.*).

On or about November 25, 2002, petitioner was released from PRC after completing three months of day treatment. PRC's discharge summary concluded that petitioner exhibited an anxiety disorder with post-

traumatic like stress features and that if he were to return to a work situation that is emotionally, politically or interpersonally "charged," the experience "would likely strain his ability to work with others in a consensual and cooperative manner"(*Id.*)

The PRC team believed that petitioner's "vulnerability to be disruptive under certain highly charged political context" could lead to compromised patient care; and it thought that petitioner remained "a bit unsteady" when faced with issues associated with hospital issues, especially Cook County Hospital issues (*Id.*). Accordingly, it concluded upon petitioner's discharge that "in the absence of having dealings with Cook County Hospital, [it] did not have significant concerns about his ability to practice medicine with skill and safety"(App. 29).

However, Elizabeth Wallace, M.D., petitioner's psychiatrist at PRC, concluded with a reasonable degree of medical certainty that he did *not* present a risk to others at the Hospital and could return to work there as an anesthesiologist as of November 20, 2002. Furthermore, Dr. Wallace did not believe petitioner threatened anyone at the Hospital and that he possessed the capacity to remain clear minded about work-related issues even though he had initially discussed hospital issues and patient care in a highly personalized or rigid manner. Thus she qualified PRC's conclusions by noting that petitioner could return to work as long as the work environment facilitated patient care and did not lead to him feeling "harassed" at the work site.

Dr. Alexander Oblosky, a forensic psychiatrist specializing in the treatment of trauma induced psychiatric disorders, a doctor later retained by petitioner, agreed with Wallace. His opinion was that petitioner was fit to return to work on November 25, 2002, that PRC's qualified opinion to the contrary was "forensically vague, incomplete, unduly broad, and internally inconsistent," and that PRC's report does not establish reasonable work accommodations for petitioner to return to work.

The Hospital's Medical Exam Policy requires all returning employees to undergo a health examination to insure their re-entry into the Hospital workforce is appropriate. The Hospital's health service physician found petitioner to be calm, collected, oriented, alert and with appropriate affect. She recommended that petitioner be returned to the Hospital "with restrictions;" and she referred him to Dr. Kapoor, the Hospital's chief psychiatrist, to assess the restrictions (App. 3).

Kapoor once again saw petitioner and concluded that while he appeared psychologically intact, he still had the capacity to produce more stress for himself at the Hospital by continuing to report fellow physicians for violations of professional standards (*Id.*). He concluded that although petitioner was not permanently precluded from the practice of medicine at the Hospital, it would not be advisable for him to return to work there without more treatment (*Id.*).

On December 2, 2002, petitioner wrote respondent Langer requesting a return to work. He also wrote respondent Cook County (the State's

Attorney and a Cook County Commissioner) objecting to being forced to undergo psychiatric evaluation about his return to work and being denied an explanation about the evaluation. Despite petitioner's letter, Dr. Wallace's opinion as petitioner's psychiatrist at PRC that he could return to work, the PRC report itself and Dr. Kapoor's opinion----all concluding that petitioner would not present a threat to his co-workers if his work environment was neutralized to some extent and if he continued in treatment, Langer then informed petitioner in writing that the Hospital planned to discharge him for threatening to kill his former Department Chairperson and several co-workers (App.3-4). A pre-disciplinary hearing was tentatively scheduled in February of 2003 and petitioner was barred from resuming work during its pendency.

Petitioner's pre-termination hearing was eventually held on May 12, 2003. Respondent Thomas presided and respondent Langer presented the charge that petitioner had committed a "major cause infraction" as defined under the Cook County Employee Conduct Policy by threatening to kill the Department Chairperson and four or five co-workers (*Id.*). However, *no* evidence was adduced by either petitioner or the Hospital about petitioner's fitness for duty as an anesthesiologist.

Petitioner asserted that his private conversation with a friend from his home did not violate any policy of the Hospital (or Cook County) as he was off-duty, not on Cook County property and was *never* charged with any criminal offense after a thorough investigation by the Chicago Police Department, the FBI and the Hospital Police Department. Moreover, after being

interviewed by these police departments, petitioner was allowed to return to work and did so for ten (10) days without incident before Langer suspended him.

On October 28, 2003, however, Thomas notified petitioner that there had occurred a "major cause infraction" warranting his discharge from Hospital employment (App. 4). Petitioner immediately filed a grievance pursuant to Hospital rules governing employee conduct. According to these rules, petitioner could seek review of this decision by resort to a three-step process culminating in a hearing before a Hearing Officer of Cook County who would hear his grievance and submit a written decision. The only way to appeal this decision of the Hearing Officer is by common law writ of certiorari in State court. Because the discipline was outright discharge, petitioner was entitled to bypass the first and second steps of the County's grievance process and proceed directly to the third step which invokes a hearing on his discharge before a Cook County Hearing Officer (App. 53-54).

While awaiting this hearing before a Hearing Officer, petitioner, on January 18, 2005, filed this civil action in federal district court for the Northern District of Illinois against respondents Cook County, Thomas and Langer (*Id.*). Petitioner alleged in a two-count complaint that his discharge violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, and was illegal because it was provoked by the exercise of his First Amendment rights (App. 1). Discovery was stayed until the administrative process was concluded.

On August 24, 2005, petitioner's grievance came before a Cook County Hearing Officer Richard J.

Krakowski, Esq., pursuant to the Third Step Appeal Process (App. 51-61). The Hospital argued that petitioner's fitness for duty as an anesthesiologist was *not* a relevant consideration in his discharge, the only purported basis for disciplining petitioner being the "major cause infraction" caused by his alleged threat.

On November 3, 2005, Krakowski issued his decision denying petitioner's appeal (App. 51-61). Instead of deciding whether petitioner had committed a "major cause infraction"----the only purported basis given by the Hospital for disciplining petitioner and a reason for which the Hearing Officer admittedly saw no support in the evidence-----he determined that petitioner nonetheless was justifiably discharged because of PRC's discharge report and "based on [Hospital] Management's appropriate desire not to chance placing the [petitioner's] co-workers in harms way by returning him to work"(App. 57;59-60-61).

The stay of discovery in federal district court was then lifted and petitioner filed a third amended complaint. In Count I, petitioner alleged disparate treatment, failure to accommodate reasonably petitioner's disability and retaliatory discharge, all violations of the ADA (App. 1;4). In Count II, petitioner sought damages under 42 U.S.C. § 1983, for the same disparate treatment, for the lack of due process in terminating him and for retaliating against him because of the exercise of his First Amendment rights (*Id.*).

A third count sought declaratory relief against Cook County because of its unfair administrative process at odds with the Hospital's Medical Staff By-Laws adopted by the County Commissioners (*Id.*). A

fourth count sought review of this unfair administrative process by common law certiorari. Petitioner alleged that the procedure which should have attended the Hospital's decision to discharge him is contained in the Medical Staff By-Laws which establish "a comprehensive due process procedure for notice, right to a hearing, and appeals for members of the medical staff at the Cook County Hospital."

After some discovery, the parties filed cross motions for summary judgment (App. 25). Petitioner sought partial summary judgment on his ADA claims under Count I and on his claims addressing the unfair administrative proceeding under Counts III and IV. Count II's allegations seeking damages under 42 U.S.C. § 1983, for *inter alia* retaliating against him because of the exercise of his First Amendment rights were not addressed in his motion. Respondents' cross motion for summary judgment did not specify that this First Amendment claim was in question. Upon these Rule 56 materials, the parties filed their respective oppositions. In their reply opposition, however, respondents *for the first time* moved for summary judgment on petitioner's § 1983 First Amendment retaliation claim under Count II, giving petitioner no opportunity to submit countervailing materials.

On January 28, 2008, the District Court, Hibbler, J., granted summary judgment in respondents' favor *on all of petitioner's claims* and denied petitioner's summary judgment motion in its entirety (App. 25-49). It dismissed petitioner's ADA claims based upon respondents' "direct threat" affirmative defense, because petitioner was not a "qualified individual" under the ADA or because he could not show disparate

treatment (App. 35-43). In *sua sponte* granting summary judgment against petitioner on his § 1983 First Amendment retaliation claim, the District Judge addressed *all* of the petitioner's claims raised in his third amended complaint, including this First Amendment retaliation claim *for which respondents never sought summary judgment in their cross motion*, waiting until their reply memorandum to do so thereby giving petitioner no opportunity to respond (App. 45-46).

The court of appeals unanimously affirmed this ruling on June 22, 2009 (A.1-24). In a decision authored by Manion, J., the court of appeals rejected petitioner's ADA claims, ostensibly because Cook County had a legitimate nondiscriminatory reason for firing petitioner, i.e., the threat which he had made to his co-workers or which the Hospital believed he had made (App. 10-12). As for petitioner's First Amendment retaliation claim and the fact that summary judgment had entered on this claim without giving petitioner a chance to proffer responsive Rule 56 materials, the appellate court affirmed the District Judge's dismissal (App. 12-15).

While conceding that respondents had failed to argue for summary judgment on petitioner's First Amendment retaliation claim until their reply brief and had thereby foreclosed an opportunity for petitioner to adduce opposing Rule 56 materials on this fact issue before the district court, the court reasoned that respondents in their reply brief did not present any new evidence in support of this belated claim and that, in any event, petitioner "had more than ample opportunity to present evidence that [his supposed

threat] was not the real reason Cook County fired him, but failed to do so" (App. 13-14). Even on appeal, the court concluded, "petitioner had every opportunity to address the issue...in the context of the First Amendment claim and he did not identify any additional evidence which would help his case" (App. 15).

The court of appeals further held that a common law writ of certiorari under Illinois law would not lie and that petitioner had received all of the process due him with the pre-termination of May 12, 2003, as well as the post-termination of August 24, 2005, before Cook County Hearing Officer, Richard J. Krakowski, Esq. (App. 18-21).

On July 16, 2009, the court of appeals denied petitioner's petition for rehearing or for rehearing *en banc* (App. 50).

REASONS FOR GRANTING THE PETITION

1. The District Court's *Sua Sponte* Entry Of Summary Judgment Against Petitioner On His Claim of First Amendment Retaliation Denied Him Due Process.

Because one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure provided by Fed. R. Civ. P. 56 does not violate a party's constitutional right to due process or to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and

therefore no right to a trial, with or without a jury, is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902). See *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279 (1917).

However, Rule 56 like the rest of the federal rules of civil procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The right to adequate notice and the opportunity to respond are deeply embedded in the Federal Rules' concept of fair play and substantial justice. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978); *Arnett v. Kennedy*, 416 U.S. 134, 142-146(1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). For example, Fed. R. Civ. P. 12(d) explicitly provides that if, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56 and "all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."

Rule 56 itself, as interpreted by this Court, requires the same elements of fair notice and an opportunity to respond. Under Fed. R. Civ. P. 56(e)(2), the opposing party is *required* to come forward with affidavits or other positive proof setting forth specific facts showing a genuine triable issue and a failure to do so will result in summary judgment being rendered against that party. As early as *Fountain v. Filson*, 336 U.S. 681, 683(1949) and culminating with *Celotex Corp. v. Catrett*, 477 U.S. 317, 326(1986), the Court has read Rule 56's language to mean that before a district court

can enter summary judgment, the party against whom the motion is brought must be given fair notice that this specific relief is being sought and must be given a meaningful opportunity "to come forward with all of [his] evidence." *Celotex, supra.*

In *Fountain*, summary judgment entered for petitioner in the district court but the appellate court not only reversed this ruling but, after examining the record anew, determined that summary judgment should have entered *against* petitioner on another theory of liability. 336 U.S. at 682-683. The *Fountain* Court reversed stating:

> [t]here was no occasion in the trial court for [petitioner] to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment, it was error for it to deprive [petitioner] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

Id. at 683.

The *Celotex* Court reinforced these notions of notice and an opportunity to respond incident to a Rule 56 ruling by noting that

> [d]istrict courts are widely acknowledged to possess the power to enter summary judgments

> *sua sponte*, so long as the losing party was on notice that [he] had to come forward with all of her evidence....
>
> ....
>
> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, *but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.*

477 U.S. at 326-327(emphasis supplied). See *Beard v. Banks*, 548 U.S. 521, 534(2006)(Rule 56(e) presumes notice and a meaningful opportunity to respond); *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 112-113(2004)(Scalia, J., concurring in part and dissenting in part) ("Nothing in *Celotex*...requires a district court to speculate *sua sponte* about possibilities even the parties have not contemplated.").

The general rule emerging from this law is that a district court (or an appellate court) lacks the power to grant summary judgment *sua sponte* unless the party against whom summary judgment was entered receives (1) proper notice that the district court was considering entering summary judgment on the claim; and (2) a fair opportunity to present evidence in opposition to the court's entry of summary judgment on the issue. *Walker v. Sheahan*, 526 F.3d 973, 980(7th Cir. 2008) quoting *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546, 549(7th Cir. 1999). *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984).

A corollary to this general rule is that a party opposing summary judgment has no obligation to address grounds *not* raised in a motion for summary judgment. *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765(7th Cir. 2006) citing *Titran v. Ackman*, 893. F.2d 145, 148(7th Cir. 1990). As the court of appeals in *Titran* explained, "[w]hen a party moves for summary judgment on ground A, the opposing party need not address ground B, C, and so on; the number of potential grounds for (and arguments against) summary judgment may be large, and litigation is costly enough without requiring parties to respond to issues that have not been raised on pain of forfeiting their position." *Id.*

Thus once a dispositive issue surfaces during the Rule 56 procedure which was not raised by the parties in their original briefs and accompanying submissions, the party standing to lose on the issue must be given the opportunity to address the question before granting summary judgment to the other party on that basis. *Celotex, supra. So. Ill. Riverboat Casino Cruises v. Triangle*, 302 F.3d 667, 677-678 (7th Cir. 2002). Otherwise, the district court may become an advocate for one of the parties instead of a neutral decisionmaker, prejudice to the opposing party will accrue and judicial efficiency will be compromised. *Id.*

Prejudice accrues because of a lack of due process. Petitioner has a cognizable property right in his continued public employment, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541(1985), and the process due him, at a minimum, is fair notice that an issue was being raised on summary judgment and a meaningful opportunity to come forward with all of his evidence on the question. Petitioner received

neither of these fundamental elements of due process from the district court before it *sua sponte* entered summary judgment on his First Amendment retaliation claim.

Petitioner sought partial summary judgment only on his ADA claims under Count I and on his claims addressing the unfair administrative proceeding under Counts III and IV, *not* on his First Amendment retaliation under Count II; and respondents' cross motion for summary judgment did not specify that this First Amendment claim was in question. It was not until respondents filed their reply memorandum that they moved *for the first time* for summary judgment on petitioner's First Amendment retaliation claim under Count II, giving petitioner no opportunity to submit opposing materials on the question.

The District Judge compounded this impropriety by granting summary judgment in respondents' favor *on all of petitioner's claims, including his First Amendment retaliation claim*, and denying petitioner's summary judgment motion in its entirety (App. 25-49). In doing so, the District Judge addressed *all* of the petitioner's claims raised in his third amended complaint, including his First Amendment retaliation claim *for which respondents never sought summary judgment in their cross motion*, waiting until their reply memorandum to do so thereby giving petitioner no opportunity to respond (App. 45-46).

Had petitioner been given an opportunity to respond, he would have adduced persuasive evidence on the issues of (1) whether his First Amendment speech was "protected" because it was on a matter of

public concern and (2) whether his interest in expressing himself was outweighed by any injury the speech could cause the Hospital in promoting the efficiency of the public service it performs through its employees. See *Waters v. Churchill*, 511 U.S. 661, 668 (1994); *Connick v. Myers*, 461 U.S. 138, 142 (1983).

Specifically, in response to respondents' belated summary judgment motion, petitioner should have had the opportunity to adduce his voluminous proof concerning his protected speech about patient abandonment by Hospital personnel, age-related rules for physicians which violate federal law, non-credentialed attending physicians which present significant risk management questions for Hospital and anesthesiology medical staff, certain "ghost surgeries," and various memos authored by petitioner chronicling a failure of care by physicians as well as serial violations of Professional Standards of Care and Hospital Policy.

Furthermore, petitioner had no opportunity to show that his speech was not made pursuant to his "official duties" as an anesthesiologist; to demonstrate how his speech was relevant to an evaluation of the Hospital, a government agency; and to address whether his many memos and letters about the Hospital's management were produced pursuant to his official responsibilities as an anesthesiologist or as a citizen making "contributions to the civic discourse." See *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006).

Finally, this improper *sua sponte* ruling against him by the district court----and its ratification by the court of appeals----has deprived petitioner of the jury

trial guaranteed on contested fact issues material to his claim. As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306 (2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

The *sua sponte* ruling below denied petitioner not only due process but also his right to a jury on material fact issues. As this Court wrote in *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958), "[t]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case." See Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178 (2007).

2. The Federal Courts Below Misapplied Summary Judgment Procedure By Construing All Fact Questions Against Petitioner, The Party Opposing Summary Judgment.

Petitioner's cause of action and his right to have his claims fairly heard and decided in federal court is a valuable property right entitled to due process

protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972). This Court has the final say in how the federal rules of civil procedure are implemented and a procedure which uses Rules 56 to *sua sponte* enter a judgment against him is suspect because the procedure denies petitioner procedural due process, including adequate notice and a fair hearing on contested fact issues. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14 (1978). *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972). *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104 (1963).

In addition, in construing the materials adduced by the parties incident to respondents' cross motion for summary judgment motion, both the district judge and the court of appeals were bound to draw all reasonable inferences from these materials *against* respondents as the moving parties and *in favor* of petitioner as the non-moving party on the motion ultimately granted; and they were also required to resolve all credibility questions in favor of petitioner, the non-moving party because the role of the courts is only to determine whether there is a genuine issue for trial. *Beard v. Banks*, 548 U.S. at 529-530. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986).

However, the federal courts below failed to perform this critical function. It misapplied summary judgment procedure by deciding *against* petitioner on every crucial fact question about whether his free speech was protected activity, whether he committed misconduct justifying his discharge, whether

respondents' investigation was fair and whether petitioner violated hospital policy or a "major cause infraction," all jury questions central to petitioner's recovery under the § 1983 First Amendment retaliation claim under Count II.

Indeed, it would be impossible for the district court (or the court of appeals) to have construed all the facts in the light most favorable to petitioner in this case when petitioner was *never* afforded the opportunity to present his account of the facts on his First Amendment retaliation claim. He should not be punished further for being deprived of this opportunity to adduce evidence on this claim and he should now be given the chance to do so by this Court.

This misapplication of Rule 56 procedure invokes the Court's power of superintendency over the federal courts and the federal system in order to reassert the lower courts' proper role in deciding summary judgment motions, i.e., reaffirming the holdings of *Beard*, *Reeves* and *Anderson* which require them to draw all reasonable inferences in favor of the party who opposes the motion for summary judgment ultimately granted and to refrain from making credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. *Beard v. Banks*, 548 U.S. at 555(Ginsburg, J., dissenting).

3. It Was Constitutional Error To Deprive Petitioner Of The *Laudermill* Hearing Authorized By The Hospital's Medical By-Laws and Central To A Fair Disposition of The Charges Against Him.

The third count of Petitioner's third amended complaint sought declaratory relief against Cook County because of its unfair administrative process at odds with the Hospital's Medical Staff By-Laws adopted by the County Commissioners. A fourth count sought review of this unfair administrative process by common law certiorari available under State law. Petitioner alleged that the procedure which should have attended the Hospital's decision to discharge him is contained in the Medical Staff By-Laws which establish "a comprehensive due process procedure for notice, right to a hearing, and appeals for members of the medical staff at the Cook County Hospital."

Because petitioner has a cognizable property right in his continued public employment, *Loudermill*, 470 U.S. at 538;541; *Barry v. Barchi*, 443 U.S. 55, 69-70 (1979)(Brennan, J., concurring in part);*Board of Regents v. Roth*, 408 U.S. 564, 576-578(1972), a pre-deprivation hearing of some sort is generally required to satisfy the dictates of due process. *Loudermill*, 470 U.S. at 542; *Roth*, 408 U.S. at 569-570. The pre-deprivation process need not always be elaborate; the amount of process depends, in part, on the importance of the issues at stake.

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) provides that the process due in any given instance is determined by weighing "the private interest that will be affected by the official

action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus contemplates a balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529 (2004). With the prospect of petitioner losing his public employment as an anesthesiologist hanging in the balance, a pre-deprivation hearing was required. *Laudermill*, 470 U.S. at 543.

The pre-termination *Laudermill* hearing which was furnished petitioner here under the Cook County Employee Conduct Policy on May 12, 2003, was carried out to resolve the Hospital's (and Langer's) sole charge that petitioner had committed a "major cause infraction" as defined under the Cook County Employee Conduct Policy by threatening to kill the Department Chairperson and four or five co-workers. Respondent Thomas presided and respondent Langer presented the charge that petitioner had committed this "major cause infraction." However, *no* evidence was adduced by either petitioner or the Hospital about petitioner's fitness for duty as an anesthesiologist. This pre-termination hearing produced a decision by Thomas that petitioner should be discharged.

This pre-deprivation *Laudermill* hearing was insufficient on its face in providing petitioner the process due him because it was conducted by personnel with a vested interest in validating their own decision

to discharge petitioner and predictably produced a result which confirmed this decision. Even the more elaborate process in place for petitioner to obtain post-deprivation review, procedures available to correct any errors in the initial decisionmaking process, fell far short of the requirements of due process.

Petitioner's ensuing Third Step appeal to Hearing Officer Krakowski under the Cook County Employee Conduct Policy invoked the same inquiry as the one considered at the pre-deprivation hearing, i.e., did petitioner commit a "major cause infraction" warranting his discharge? *Hearing Officer Krakowski answered this question in the negative.* He conceded at the hearing that he saw no basis in the evidence for making such a finding. However, going beyond his jurisdiction and fatally contaminating the procedure *ab initio*, Krakowski went on to determine that petitioner nonetheless was justifiably discharged on the basis of PRC's discharge report and "based on [Hospital] Management's appropriate desire not to chance placing the [petitioner's] co-workers in harms way by returning him to work"(App. 57;59-60-61).

In this way, petitioner was discharged for a reason about which he had no notice prior to the hearing and for which he had no opportunity to adduce evidence. Once Hearing Officer Krakowski determined that petitioner had not committed a "major cause infraction," he was duty bound by the Cook County Employee Conduct Policy to exonerate petitioner and then reinstate him to his employment with appropriate restrictions. He possessed no authority to review anew medical determinations under the Hospital's Medical Exam Policy or to uphold petitioner's discharge based

upon a medical evaluation which was not the subject of the hearing. For the reasons already adverted to in Part 1, *supra*, this procedure denied petitioner due process by depriving him of fair notice of the charges against him and a meaningful opportunity to respond to these new charges.

After all, an employee has been denied due process even if he has the benefit of one hundred hearings if the opposing party to the hearing purposely supplies false or misleading evidence which diverts the factfinder from the real issues before him. *In re Murchison*, 349 U.S. 133, 136(1955). Such is the case here. The Hospital purposely put before Hearing Officer Krakowski misleading, opinionated medical evidence concerning petitioner's medical evaluation---- none of which addressed issue of a "major cause infraction"----in order to shore up its case for discharging petitioner. This scenario denied petitioner procedural due process and justifies voiding the Hearing Officer's ruling finding that petitioner be terminated.

These insufficient *Laudermill* procedures offered petitioner under the Cook County Employee Conduct Policy could not have provided the process due petitioner in any event. Instead, the procedure which should have attended the Hospital's decision to discharge him is contained in the Medical Staff By-Laws which establish a comprehensive due process procedure for notice, right to a hearing, and appeals for members of the medical staff at the Cook County Hospital. It was this procedure which the Hospital should have implemented incident to its attempt to discharge petitioner.

Specifically, petitioner was at all relevant times an attending physician at Cook County Hospital and therefore enjoyed all the privileges of a member of the medical staff, e.g., the authority to make medical decisions about patients and to use the Hospital's facilities in furtherance thereof. In return, petitioner agreed to abide by the Medical Staff By-Laws. The Hospital too is bound by the Medical Staff By-Laws as they constitute an enforceable contract between the attending physician and the Hospital. *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1251 (8th Cir. 1987). *Adler v. Montefiore Hospital Assn. of Western Pennsylvania*, 311 A.2d 634,637 (Pa. 1973), *cert. denied*, 414 U.S. 1131(1974).

Once petitioner's fitness to practice as a full-time attending physician at the Hospital was brought into question, the By-Laws obligated respondent Thomas as the Hospital's Director to submit the matter to the Medical Staff Peer Review Committee for their review and ultimate recommendation to the Hospital's Governing Board. Thomas' failure to do so violated the Medical By-Laws and deprived petitioner of the comprehensive due process safeguards for notice, right to a hearing and appeals for members of the medical staff at the Cook County Hospital in addressing their physical and mental health issues.

Moreover, respondent Langer had no authority to ignore the procedures set out by the Medical By-Laws and instead submit the question of petitioner's fitness to the less elaborate administrative process set out in the Cook County Employee Conduct Policy. The Medical By-Law procedures allow for the suspension of an attending physician's privileges whenever necessary

in the best interest of patient care and the Governing Board is empowered to review any intermediate decision in this regard. The Medical By-Laws applied to this controversy and were plainly more appropriate to address the matter fairly, timely and with due process for all parties. The Hospital's renunciation of this process and its circumvention of the Board's right of review in favor of one which affirmed petitioner's discharge for reasons having nothing to do with a "major cause infraction"----instead having everything to do with issues more appropriate for decision by the Peer Review Committee and the Board----denied petitioner due process.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the Northern District of Illinois, with instructions that petitioner's claims against the respondents be tried to a jury; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Dennis P. Derrick
Seven Winthrop Street
Essex, MA 01929
(978)768-6610

Glenn R. Gaffney
Counsel of Record
Gaffney & Gaffney
1771 Bloomingdale Road
Glendale Heights, IL 60139
(630)462-1200

(any footnotes trail end of each document)

No. 08-1450

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PHILIP C. BODENSTAB, M.D.,
Plaintiff-Appellant,
v.
COUNTY OF COOK, LACY L. THOMAS, and BRADLEY LANGER, M.D., Defendants-Appellees.

February 12, 2009, Argued

June 22, 2009, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 05 C 281--William J. Hibbler, Judge.

Before EASTERBROOK, Chief Judge, and FLAUM and MANION, Circuit Judges.

MANION, *Circuit Judge.* Philip Bodenstab sued Cook County and Cook County Hospital's Chief Operating Officer, Lacy Thomas, and Medical Director, Bradley Langer, after he was fired from his position as an anesthesiologist at Cook County Hospital (now known as Stroger Hospital). Bodenstab alleged he was fired in violation of the Americans with Disabilities Act ("ADA"), and for exercising his First Amendment rights. Bodenstab also sought to overturn the state administrative decision upholding his firing and argued that the termination proceedings violated his due process rights. The defendants moved for summary judgment, arguing that they were justified in firing Bodenstab because he had threatened to kill his

supervisor and co-workers. The district court granted the defendants summary judgment and Bodenstab appeals. We affirm.

I.

Dr. Philip Bodenstab began working as an anesthesiologist at Cook County Hospital in Chicago, Illinois in 1993. On February 22, 2002, Bodenstab telephoned a friend, Jennifer Wengeler, who lived in Seattle, Washington. According to Wengeler, Bodenstab (who had recently been diagnosed with a cancerous lesion on his lip) told her that he was going to the Mayo Clinic and that if the cancer had metastasized, he was going to kill his supervisor, Dr. Winnie, and other co-workers. According to Wengeler, Bodenstab further stated that it was possible he might die in the ensuing gun battle with police. Wengeler stated that out of concern for the safety of Bodenstab and his co-workers, she contacted the Chicago Police and the Seattle FBI office.

The Chicago Police and the FBI started an investigation into the threats and alerted Cook County Hospital Medical Director (and defendant) Bradley Langer. They told Langer that the death threats were credible. Defendant Lacy Thomas also reviewed the police reports, and later participated in the decision to fire Bodenstab.

Rather than firing Bodenstab immediately, the hospital administratively suspended Bodenstab, with pay, and directed him to make an appointment with a forensic psychiatrist for a fitness of duty evaluation. Bodenstab refused. Eventually, Bodenstab and the hospital agreed that he would obtain treatment at the Professional

Renewal Center ("PRC") in Lawrence, Kansas. Bodenstab completed a five-day multi-disciplinary assessment at the PRC on August 24, 2002. The multi-disciplinary assessment concluded that Bodenstab suffered from paranoid and narcissistic personality features and occupational and interpersonal stressors. After the conclusion of the assessment, on August 26, 2002, Bodenstab elected to be admitted to the PRC's "Intensive Day Treatment Program" and he continued this treatment for approximately three months.

Upon Bodenstab's discharge from treatment in late November 2002, the PRC provided Cook County with a Treatment Discharge Summary. The Discharge Summary stated that Bodenstab was fit to return to practice, but not "to a work situation that is emotionally, politically, or interpersonally charged, as such an environment would likely strain his ability to work with others in a consensual and cooperative manner." The Discharge Summary also recommended that Bodenstab continue to be monitored by a psychiatrist and enter into a longer psychotherapy program, but it appears Bodenstab did neither.

After Bodenstab's discharge from the PRC, Cook County asked its psychiatrist, Dr. Deepak Kapoor, to interview Bodenstab. Kapoor was concerned that Bodenstab exhibited paranoia and interpersonally charged issues and Kapoor felt concerned for his own safety. On January 17, 2003, the hospital informed Bodenstab that it would hold a pre-disciplinary hearing concerning his behavior. The notice specified that Bodenstab had been accused of a major infraction--threatening to kill the department co-chairperson, Dr. Winnie, and four or five co-workers. Defendant Thomas

presided over the pre-disciplinary hearing. Following the hearing, Thomas concluded that Bodenstab's conduct warranted discharge. Bodenstab appealed the decision to an independent Hearing Officer. The Hearing Officer affirmed the decision to terminate Bodenstab, stating that hospital management appropriately did not want to risk placing Bodenstab's co-workers in harm's way.

After he was fired, Bodenstab sued Cook County, Lacy Thomas, and Bradley Langer (hereinafter "Cook County"). He sought to overturn the administrative decision terminating him, and also alleged that his firing violated the First Amendment, the Americans with Disabilities Act, and his due process rights. The district court granted the defendants summary judgment and Bodenstab appeals.

II.

On appeal, Bodenstab challenges the district court's grant of summary judgment on each of the claims he presented. We consider each claim in turn, "bearing in mind that we review a district court's grant of summary judgment de novo and view the evidence in the light most favorable to the appellant." *Hancock v. Potter*, 531 F.3d 474, 478 (7th Cir. 2008).

A. ADA Claims

First we consider Bodenstab's ADA claims. Bodenstab presented several theories for recovery under the ADA, including disparate treatment, failure to accommodate, and retaliation. The district court granted Cook County summary judgment on each of

these claims because, among other reasons, it concluded that Bodenstab "was not disabled within the meaning of the ADA."

The ADA prohibits discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). An individual has a "disability" within the meaning of the ADA if he has "a physical or mental impairment that substantially limits one or more major life activities . . .; a record of such an impairment; or [is] . . . regarded as having such an impairment." 42 U.S.C. § 12102(2).

Bodenstab does not claim that he has an actual impairment that substantially limits a major life activity, but rather argues that Cook County regarded him as having such an impairment, namely being impaired in the ability to interact with others. It is unclear whether "interacting with others" is, in itself, a "major life activity" within the meaning of the ADA. In *Emerson v. Northern States Power Co.*, 256 F.3d 506, 511 (7th Cir. 2001), the plaintiff had argued that her brain injury impaired her in the major life activity of "interacting with others," but we noted that she offered "no legal precedent to support her assertion." Accordingly, we treated her impairment in "interacting with others" as a factor that fed "into the major life activities of learning and working." *Id.* In this case, though, Bodenstab claims interacting with others as the sole "major life activity," so there is nothing else into which this factor can feed. And since *Emerson* we have not further considered this issue.

However, we need not decide whether "interacting with others" qualifies as a "major life activity," or, if it does, whether Bodenstab was substantially limited in this

activity. Even assuming *arguendo* that "interacting with others" is a "major life activity," and further assuming *arguendo* that Bodenstab was "substantially limited in this activity," as explained below, his ADA claims still fail for several reasons.[1]

Bodenstab's first claim is for disparate treatment. Bodenstab alleges that Cook County fired him because of his perceived disability and that its assertion that it fired him because of his alleged threats is pretextual. While the question of pretext arises only after a plaintiff has established a prima facie case of discrimination and the employer has countered with a legitimate non-discriminatory reason for the adverse action, we can skip over the initial burden-shifting of the indirect method and focus on the question of pretext. *Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 556 (7th Cir. 2001) ("Like the district court, we will assume, without deciding, that [the plaintiff] established a prima facie case of discrimination.").[2]

"Pretext means a dishonest explanation, a lie rather than an oddity or an error." *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 642 (7th Cir. 2008) (internal quotations omitted) "Showing pretext requires [p]roof that the defendant's explanation is unworthy of credence." *Filar v. Bd. of Educ. of City of Chicago.*, 526 F.3d 1054, 1063 (7th Cir. 2008) (internal quotations omitted).

In this case, Cook County presented evidence that it fired Bodenstab because he had threatened his co-workers. On appeal, Bodenstab spends a great deal of time downplaying his threats, characterizing them as "conditional syllogisms" and claiming Wengeler

misinterpreted his comments. However, "to show pretext, [plaintiff] must show more than [defendant's] decision was mistaken, ill considered or foolish, [and] as long as [the employer] honestly believes those reasons, pretext has not been shown." *Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 823 (7th Cir. 2006)) (internal quotation omitted). Thus, "[o]ur only concern is with the honesty of [Cook County's] beliefs," and not with whether Bodenstab actually made the specific threats, as claimed by Wengeler. *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 726 (7th Cir. 2008).

Bodenstab does not present any evidence calling into question the sincerity of Cook County's belief that he had threatened to harm his co-workers and that it fired him for that reason. Rather, the undisputed evidence supports Cook County's belief that Bodenstab made these threats. Specifically, Cook County received an incident report from the Chicago Police Department that stated: "Jennifer Wengeler contacted [the police department]. She stated that she had received a call on 22Feb02 from Bodenstab. He stated, in summary, that he was going to the Mayo Clinic for tests and if these tests turned out badly he was going to kill Dr. Alon Winnie and other staff members at Cook County Hospital." Cook County also received a Multi-Disciplinary Assessment Report from the PRC that also referred to Wengeler's statement that "Dr. Bodenstab indicated that if he were to find out that his cancer had spread, he had 'plans to kill' his former chief, Dr. Alon Winnie, and four to five of his physician coworkers." The Multi-Disciplinary Report then stated: "Dr. Bodenstab does not deny having a conversation with the informant that was thematically consistent with what is outlined above, but denies having any

intent to actually carry out a murder-suicide." Moreover, Bodenstab admitted to telling Wengeler: "Well maybe I'll take some people with me if, if I have cancer, if I'm found to have metastases. Maybe, maybe it wouldn't be so bad being dead if you have metastases. They shoot horses don't they? If I have metastases, then maybe I would take some people with me."

In response, Bodenstab argues that because the Hearing Officer rejected Cook County's reliance on the threats as a basis for firing him, a jury could also find that reason pretextual. Bodenstab, however, misrepresents the Hearing Officer's decision. In affirming Cook County's decision to terminate Bodenstab, the Hearing Officer did not reject Cook County's conclusion that Bodenstab had threatened his co-workers; rather, the Hearing Officer did not reach the issue, ruling instead that he merely needed "to decide if Management could justify its conclusion to discharge [Bodenstab]." The Hearing Officer then concluded that Cook County was justified in discharging Bodenstab because "[i]t would have been too risky to chance returning [Bodenstab] to his previous position as a Doctor of Anesthesiology at Stroger Hospital in view of the recommendations and observations made by PRC Staff." Thus, the Hearing Officer's decision does not support Bodenstab's claim of pretext.

Bodenstab also claims that he presented sufficient evidence of pretext, as well as circumstantial evidence of discrimination, by showing that Cook County failed to follow its own internal policies and by pointing to inconsistencies in various witnesses' testimony. Bodenstab, however, did not develop these arguments

until his reply brief and thus has waived any such argument. *See United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006) (holding that arguments not fully developed until a reply brief are waived). In any event, the evidence Bodenstab identifies does not support a reasonable inference of discrimination. Nor does it counter the evidence Cook County presented that it fired Bodenstab for threatening (or because it reasonably believed he had threatened) his co-workers.

In addition to firing Bodenstab for threatening his co-workers, Cook County informed Bodenstab that it further believed he was a "direct threat to the health and safety of other individuals in the workplace" and thus was no longer qualified to work as an anesthesiologist at Cook County. Under the ADA, an individual is not qualified if he presents a "direct threat" to his own health and safety or that of others. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79, 87, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002). In this circuit, the employer has "the burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation." *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004).

We need not decide, however, whether the undisputed evidence supports Cook County's conclusion that Bodenstab presented a direct threat to others. Even if Cook County could not satisfy its burden of establishing that Bodenstab presented a direct threat to the health and safety of others in the workplace, summary judgment was nonetheless appropriate because Cook County presented undisputed evidence that it fired Bodenstab for threatening his co-workers. As we explained in *Fischer v. Avanade, Inc.*, 519 F.3d 393,

403-04 (7th Cir. 2008), "when a defendant has offered multiple nondiscriminatory reasons for its hiring decision, showing that one of these reasons is pretextual is not enough . . . ." While *Fischer* noted that "there may be circumstances where 'multiple grounds offered by the defendant . . . are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment,' " *id.* at 404 (internal quotation omitted), this case is not one of those rare circumstances. Rather, Bodenstab's challenge to the "direct threat" basis for his termination rests not on the pretext of that rationale, but on a claim that his condition did not present a direct threat. Thus, even if Cook County improperly determined that Bodenstab presented a "direct threat" within the meaning of the ADA, summary judgment on the termination claim was nonetheless appropriate because Cook County had a legitimate nondiscriminatory reason for firing Bodenstab--the threats he had already made (or that it reasonably believed he had made).

In addition to his disparate treatment claim, Bodenstab presented a failure to accommodate claim. That claim fails for the simple reason that, as explained above, the evidence established that Cook County fired Bodenstab because of his threats to harm co-workers. There is no legal obligation to "accommodate" conduct, as opposed to a disability, as we explained in *Spath v. Hayes Wheels Intern.-Indiana, Inc.*, 211 F.3d 392 (7th Cir. 2000). In *Spath*, the employer fired the plaintiff after he was injured while engaging in horseplay, and then when confronted with the facts, lied about the incident. The plaintiff sued his employer and argued with respect to his failure to accommodate claim "that his organic

brain syndrome, mild mental retardation, and dependent personality disorder . . . caused him to deny involvement in the horseplay incident because he sometimes does not remember what he was doing or what he might have said in the past." *Id.* at 395 n.5. We explained that "[i]n essence, Spath is asking this Court to extend the ADA . . . to prevent an employer from terminating an employee who lies, just because the lying is allegedly connected to a disability." *Id.* We rejected this argument, noting that "the ADA does not require this." *Id. See also Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) ("The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability."). Similarly, in this case, Cook County did not have an obligation to accommodate Bodenstab's threats, even if they were somehow related to a disability.

Bodenstab's final ADA claim is for retaliation; Bodenstab argues that he was fired for engaging in various protected activities. It is questionable whether the activities Bodenstab identifies--writing a letter to defendant Thomas asking to be reinstated, his complaints about being forced to undergo psychiatric examinations, and his identifying reasonable accommodations in his summary judgment memorandum--are protected activities. However, even assuming Bodenstab engaged in protected activities, he did not present sufficient evidence that the defendants fired him because he engaged those activities. Rather, the undisputed evidence shows that Cook County fired Bodenstab for threatening his co-workers. Thus, his retaliation claim also fails. *See, e.g., Jasmantas v.*

Subaru-Isuzu Automotive, Inc., 139 F.3d 1155, 1157 (7th Cir. 1998) (affirming grant of summary judgment to employer on plaintiff's retaliation claim where evidence showed employer fired plaintiff because it believed she had "been dishonest with the company about her injuries" and plaintiff's evidence did not indicate this reason was pretextual).

B. First Amendment

Next, we consider Bodenstab's First Amendment claim. Bodenstab claims that he engaged in constitutionally protected speech and was fired in retaliation for engaging in that speech. Specifically, Bodenstab says that he spoke out against, among other things, patient abandon-ment, ghost surgeries, lack of credentialed physicians, and physicians sleeping on duty. The district court granted Cook County summary judgment on Bodenstab's First Amendment claim, concluding that his speech was not constitutionally protected and was too remote in time from his termination to establish causation.

"To make out a prima facie case of first amendment retaliation, a public employee must present evidence that: (1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the employer's action." *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006) (citations omitted). If the plaintiff can satisfy this burden, the defendant may avoid judgment by showing he "would have taken the same action even in the absence of [the plaintiff's] exercise of his First Amendment rights." *Samuelson v.*

LaPorte Cmty. Sch. Corp., 526 F.3d 1046, 1053 (7th Cir. 2008).

On appeal, Bodenstab initially argues that the district court erred in granting Cook County summary judgment on his First Amendment claim because Cook County did not seek summary judgment on this claim until its reply brief. As a result, Bodenstab argues that he was denied the opportunity to submit evidence showing he had engaged in protected speech and that there was a causal connection between his speech and his termination.

While it is true that before the district court Cook County did not support its argument for summary judgment on Bodenstab's First Amendment claim until its reply brief, Cook County did move for summary judgment on all claims, including Bodenstab's § 1983 claim brought in Count II. In Count II, Bodenstab presented five distinct theories for recovery under § 1983, including his First Amendment claim. After Bodenstab pointed out in his response memorandum that his § 1983 claim presented multiple theories of recovery, including a First Amendment claim, Cook County addressed the propriety of summary judgment on the First Amendment claim in its reply brief. In doing so, Cook County did not present any new evidence. Rather, Cook County relied on the evidence Bodenstab submitted as part of the summary judgment proceedings, including an exhibit Bodenstab submitted which listed forty-one documents he claimed constituted protected speech.

On appeal, Bodenstab notes that the exhibit merely summarized the forty-one documents, and that had he

known Cook County was seeking summary judgment on his First Amendment claim, he would have presented the actual documents. According to Bodenstab, the "form, content and level of distribution on the 'cc' list" of those documents would have established that he had engaged in protected First Amendment speech.

However, even assuming that Bodenstab succeeded in establishing that he engaged in constitutionally protected speech,[3] his First Amendment claim fails for the same reason as his ADA claims: Cook County presented undisputed evidence that it fired Bodenstab because he threatened to kill his co-workers. Bodenstab has not presented any evidence calling into question the veracity of Cook County's rationale for his termination. Although Bodenstab might not have had notice that his First Amendment claim was under summary judgment consideration, he clearly knew that Cook County was relying on his threats as the basis for his termination. In the context of his ADA claim, Bodenstab had more than ample opportunity to present evidence that that was not the real reason Cook County fired him, but he failed to do so. Because the same legitimate non-discriminatory reason defeats any First Amendment claim, the district court did not err in granting the defendants summary judgment on that claim as well. *See Golden Years Homestead, Inc. v. Buckland*, 557 F.3d 457, 462 (7th Cir. 2009) (upholding a grant of summary judgment where the evidence relating to the defendant's possible retaliatory motive was the same for the state law claims not addressed as the federal constitutional claims which were addressed); *Acequia, Inc. v. Prudential Ins. Co. of Am.*, 226 F.3d 798, 807 (7th Cir. 2000) (upholding grant of summary judgment

where the losing party had notice of the basis for the motion for summary judgment on one claim and that same basis doomed the remaining seven claims). Moreover, on appeal Bodenstab had every opportunity to address the issue of causation in the context of the First Amendment claim and he did not identify any additional evidence which would help his case. "[A] *sua sponte* judgment may be affirmed if the complaining party cannot show on appeal that it was deprived of the opportunity to present a viable claim," *Tranzact Tech., Ltd. v. Evergreen Partners, Ltd.*, 366 F.3d 542, 549 (7th Cir. 2004), as there is "no reason to remand the case because [the plaintiff] was given a full opportunity to make its argument on appeal." *S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F.3d 667, 678 (7th Cir. 2002). *See also Buckland*, 557 F.3d at 462 (upholding a grant of summary judgment even though the defendant did not specifically address state law claims in its opening motion for summary judgment because the plaintiff did not identify any significant evidence that it omitted).

C. Common Law Certiorari

Bodenstab's next claim is a supplemental state law claim for common law *certiorari*. Under Illinois law, "[w]here the Administrative Review Law has not been expressly adopted, the writ of common law *certiorari* survives as an available method of reviewing the actions of agencies and tribunals exercising administrative functions." *Stratton v. Wenona Community Unit Dist. No.* 1, 133 Ill. 2d 413, 551 N.E.2d 640, 645, 141 Ill. Dec. 453 (Ill. 1990). As the Illinois Supreme Court explained, "[t]he common law writ of *certiorari* was developed to provide a means whereby a

petitioner who was without avenue of appeal or direct review could obtain limited review over action by a court or other tribunal exercising quasi-judicial functions." *Id.* Thus, "where a final administrative decision has been rendered," such as the one affirming Bodenstab's firing, a court may review that decision. *Id.* 645-46.

In reviewing an administrative decision, the question "under common law *certiorari*, as in statutory *certiorari* proceedings, is whether the record contains any evidence which fairly tends to support the agency's findings." *Maddox v. Williamson Cnt. Bd. of Comm'rs*, 131 Ill. App. 3d 816, 475 N.E.2d 1349, 1354, 86 Ill. Dec. 782 (Ill. App. Ct. 1985). Courts may "not reweigh the evidence and may set aside the agency's findings only if they are palpably or manifestly against the weight of the evidence." *Id.* In reviewing an agency's decision to discharge an employee, we "further ask whether the agency's findings of fact [were] sufficient to warrant discharge under the applicable standard of conduct. *Id.* A "discharge will be overturned where found to be arbitrary and unreasonable." *Id.* "Simply put, if there is evidence of record that supports the agency's determination, it must be affirmed."[4] *Kimball Dawson, LLC v. City of Chicago Dept. of Zoning*, 369 Ill. App. 3d 780, 861 N.E.2d 216, 222, 308 Ill. Dec. 151 (Ill. App. Ct. 2006).

In this case, the Hearing Officer who reviewed Bodenstab's discharge found that "[i]t would have been too risky to chance returning [Bodenstab] to his previous position as a Doctor of Anesthesiology at Stroger Hospital in view of the recommendations and observations made by PRC Staff." The Hearing Officer

further concluded that "[m]anagement could not place [Bodenstab] in a situation which could have resulted in the disruption of operations at Stroger Hospital and/or place his co-workers in harm's way." Based on these factual findings, the Hearing Officer concluded that Cook County was justified in discharging Bodenstab.

As noted above, we may not reweigh the evidence or set aside the Hearing Officer's findings of fact unless they were "palpably or manifestly against the weight of the evidence." *Maddox*, 475 N.E.2d at 1354. In this case, the evidence supported the Hearing Officer's findings of fact. As the Hearing Officer noted, the PRC concluded that Bodenstab could not work safely in an "emotionally, politically, or interpersonally charged environment." The Hearing Officer also heard testimony concerning Bodenstab's time at Cook County and this testimony further supported the Hearing Officer's conclusion that it was "too risky" to return Bodenstab to his position as a Doctor of Anesthesiology.

The Hearing Officer likewise did not err in concluding that Cook County was justified in terminating Bodenstab based on these facts. In Illinois, " 'cause' has been judicially defined as some substantial shortcoming which renders the employee's continuance in his office or employment in some way detrimental to the discipline and efficiency of the service." *Davis v. City of Evanston*, 257 Ill. App. 3d 549, 629 N.E.2d 125, 132, 195 Ill. Dec. 817 (Ill. App. Ct. 1993) (internal citations omitted). Bodenstab's inability to work safely in an "emotionally, politically, or interpersonally charged environment" qualifies as a substantial shortcoming, rendering his continuance as an anesthesiologist

detrimental to the discipline and efficiency of service. Accordingly, we affirm the Hearing Officer's decision upholding Bodenstab's termination.

Bodenstab also challenges the Hearing Officer's decision by arguing that in reviewing his termination, the Hearing Officer should have applied the rules set forth in the Medical Staff Bylaws, as opposed to the Rules and Regulations Governing Employee Conduct. The Hearing Officer rejected this argument, concluding that the Medical Staff Bylaws governed medical staff membership and clinical privileges at Cook County health facilities and not disciplinary actions, whereas disciplinary actions were governed by the Hospital Rules and Regulations Governing Employee Conduct. Because in this case Cook County sought to terminate Bodenstab based on the "just cause" provisions contained in the Hospital Rules and Regulations, the Hearing Officer's decision to apply those rules was supported by the evidence.

Bodenstab further argues that the Hearing Officer erred in upholding his firing because County Board President John H. Stroger did not approve his discharge, as he claims was required by County policy. The record evidence, however, does not support Bodenstab's claim that Stroger had not approved of his termination. Bodenstab bore the burden of proof, and thus to avoid summary judgment needed to present such evidence. He did not do so, and accordingly this argument fails as well. [5]

D. Due Process Claims

Finally, Bodenstab argues that the district court erred in granting the defendants summary judgment on his due process claims. The Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), held that due process "requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." (internal quotations omitted). Under *Loudermill*, "when adequate posttermination proceedings exist, a pretermination hearing need only provide 'an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.' " *Michalowicz v. Village of Bedford Park*, 528 F.3d 530, 536-37 (7th Cir. 2008) (quoting *Loudermill*, 470 U.S. at 545-46).

In this case, prior to his termination, Cook County provided Bodenstab with a pretermination hearing. Cook County notified him by letter dated January 17, 2003, that this hearing would take place on February 20, 2003, "to discuss the charges set forth below." The letter then stated that Bodenstab had "committed a major cause infraction by threatening to kill [his] former Department Chairperson and four to five of [his] co-workers." Cook County also provided a summary of the grounds supporting this charge, noting the reports it had received from the Chicago Police Department and the FBI, and stated that "[i]f the above charges are supported by sufficient facts, you may be disciplined up to and including discharge." The letter also summarized Bodenstab's treatment at the PRC and the Multi-Disciplinary Assessment Diagnostic Report, as well as the PRC Report's statement that Bodenstab should not

return "to a work situation that is emotionally, politically, or interpersonally charged as such an environment would likely strain his ability to work with others in a consensual and cooperative manner." The letter then concluded that "[g]iven the serious nature of your threats against the lives of your co-workers and in consideration of . . . the report from the Professional Renewal Center . . . the County believes that you pose a direct threat to the health and safety of other individuals in the workplace." The noticed pretermination hearing was eventually held on May 12, 2003. (Bodenstab had requested various delays from the original February 20, 2003, hearing date.) At the pre-termination hearing Bodenstab had the opportunity to respond to the charges set forth in the January 17, 2003 letter.

For a pre-termination hearing to comply with due process requirements the employee must receive: (1) oral or written notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity to tell his side of the story. *Staples v. City of Milwaukee*, 142 F.3d 383, 385 (7th Cir. 1998). The notice and pre-termination hearing Bodenstab received more than complied with the mandates of the due process clause.

Following the pre-termination hearing, Bodenstab appealed his termination and received another hearing. At that hearing, Bodenstab again had the opportunity to present his side of the story and respond to the allegations stated in the January 17, 2003 letter. As explained above, following that hearing, the Hearing Officer concluded that Cook County properly terminated Bodenstab because it was "too risky" to return Bodenstab to his position as a Doctor of

Anesthesiology.

In response, Bodenstab argues he was denied adequate pre- and post-termination hearings because he was notified that he was being discharged for a "major cause infraction" (his alleged threats), but was then terminated for a different reason (his inability to work safely as an anaesthesiologist at Cook County Hospital). However, the January 17, 2003, letter was not so limited; rather, that letter also specifically referred to and explained the basis for Cook County's conclusion that Bodenstab could not be retained as an anaesthesiologist because he was a direct threat to the health and safety of others. At the final hearing, Bodenstab had the opportunity to present evidence and arguments concerning the PRC Reports and his ability to function safely at Cook County Hospital. Thus, he had more than sufficient notice and an opportunity to be heard on the grounds on which the final Hearing Officer affirmed his termination. For these reasons, Bodenstab's due process claims fail.

III.

Cook County presented undisputed evidence that it fired Bodenstab because he threatened to kill his co-workers. Bodenstab did not present sufficient evidence of pretext to avoid summary judgment on Cook County's ADA claims. These threats likewise doomed Bodenstab's First Amendment retaliation claim. Additionally, the Hearing Officer's decision affirming Bodenstab's termination was proper and thus Bodenstab's common law *certiorari* claim likewise fails. Finally, Bodenstab's due process claims fail because Cook County provided him with constitutionally

sufficient notice and an opportunity to be heard. Accordingly, the district court properly granted Cook County summary judgment. For these and the foregoing reasons, we AFFIRM.

Footnotes

1Bodenstab also argues in passing that he is disabled within the meaning of the ADA because he has a record of a disability, again in the major life activity of "interacting with others." This argument is undeveloped, but as noted, we need not resolve the issue because Bodenstab's ADA claims fail even assuming he is "a qualified individual with a disability."

2In arguing that he has established a prima facie case of disparate treatment, Bodenstab claims that Cook County punished him more severely for his misconduct than similarly situated employees who were not "disabled." For an individual to succeed on a discrimination claim based on alleged disparate treatment in discipline, the other individuals must be comparable "in all material respects." *Brummett v. Sinclair Broad. Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005). This includes a showing that the employee held the same type of job, was disciplined by the same supervisor, was subject to the same standards, had comparable experience and qualifications, and engaged in the same conduct without differentiating or mitigating circumstances. *Id.* at 692-93. Discipline from a different supervisor "sheds no light" on the disciplinary decision. *Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004). In support of his position, Bodenstab points to several individuals who were disciplined (but not fired) for various conduct,

such as fighting with other employees or bringing a handgun to the hospital. None of these other employees' conduct, however, was comparable to Bodenstab's and none was supervised by the same individuals. Therefore, Bodenstab also did not present sufficient evidence that similarly situated individuals without a disability were treated more favorably.

3"Speech is constitutionally protected if (1) the employee spoke as a citizen on matters of public concern, and (2) the interest of the employee as a citizen in commenting upon matters of public concern outweighs the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees." *Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 509 (7th Cir. 2007). As the Supreme Court explained in *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

4The parties dispute whether under Illinois law, the administrative findings of "cause" are considered "*prima facie* true and correct." *We* need not delve into this question of state law because, as discussed below, Bodenstab's common law *certiorari* claim fails whether or not we consider the agency's determination of cause *prima facie* true.

5In his reply brief, Bodenstab also asserts that the Hearing Officer improperly upheld his discharge based on off-duty conduct. By not making this argument until

his reply brief, it is waived. *Alhalabi*, 443 F.3d at 611. In any event, we agree with the Hearing Officer that the fact that Bodenstab made the threats while off duty is irrelevant, as they clearly affected his ability to practice medicine safely while on duty.

No. 05 C 281

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

PHILIP C. BODENSTAB, M.D.,
Plaintiff

v.

COUNTY OF COOK, LACY L. THOMAS, AND BRADLEY LANGER, M.D.,
Defendants.

January 28, 2008, Decided
January 28, 2008, Filed

MEMORANDUM OPINION AND ORDER

Dr. Philip Bodenstab called a friend and told her that "[maybe] I'll take some people with me if I have cancer . . . [m]aybe it wouldn't be so bad being dead if you've got metastases . . .[t]hey shoot horses don't they." Whether made in jest or in a moment of frustration, Bodenstab's comment sufficiently alarmed his friend such that she called both the Chicago Police and the FBI, setting in motion a series of events that eventually led to the Cook County Hospital's decision to terminate him. After his termination, Bodenstab sued the Hospital, raising a host of claims related to the Americans with Disabilities Act and associated due process claims concerning his discharge. Both parties move for summary judgment.

I. Factual Background

In 2002, Bodenstab worked as an anesthesiologist at Cook County Hospital in Chicago, Illinois. (Def. 56.1(a)(3) St. P 1). In February 2002, Bodenstab called a friend, Jennifer Wengeler in Seattle, Washington, and discussed with her an upcoming appointment he had at the Mayo Clinic in Rochester, Minnesota. (Wengeler Dep. at 9-10). According to Wengeler, Bodenstab told her that if he learned from his appointment at the Mayo Clinic that a lesion on his lip had metastasized, he would kill his former supervisor, Dr. Alon Winnie and several other co-workers. (Wengeler Dep. at 9-10). [1]

Alarmed, Wengeler contacted the Chicago Police Department and the Seattle Field Office for the FBI. (Def. Ex. 4; Wengeler Dep. 14-16). The Chicago Police Department, the FBI, and the Cook County Hospital Police all conducted investigations based on Wengeler's report. (Def. Exs. 4-6). Shortly thereafter, Dr. Bradley Langer, the Hospital's Medical Director, spoke with both the Chicago Police Department and the FBI about the threats made by Bodenstab. (Langer Dep. 16-20). The Chicago Police told Langer that it believed the threat posed by Bodenstab to be credible. (Langer Dep. at 41, 110). Langer did not immediately suspend Bodenstab, but informed him of the ongoing investigations. (Pl. 56.1(b)(3)(C) St. PP 6-7).

In March 2002, FBI Agent Mark Quinn and Cook County Hospital Police Sergeant Curlce Adams met Bodenstab, who denied making any threats regarding Hospital personnel. (Def. St. P 4). Despite Bodenstab's denial of wrongdoing, Langer suspended him with pay and directed him to submit to psychiatric evaluation with Dr. Karl Wahlstrom. (Def. Ex. 14). Bodenstab,

however, disregarded Langer's order and initially refused to see Wahlstrom. (Bodenstab Dep. at 123). The Hospital insisted that Bodenstab undergo a psychiatric evaluation, but Bodenstab repeatedly resisted the Hospital's requests. (Def. St., Ex. 15). Eventually, the Hospital informed Bodenstab through his counsel that it had accommodated his requests for the selection, scheduling, and confidentiality of his evaluation and that if he did not report to the Professional Review Center in Lawrence, Kansas, on August 19 it would initiate termination proceedings against him. (Def, St., Ex. 15). Bodenstab finally relented and attended a five-day evaluation at the PRC. (Def. St., PP 24-25).

At the PRC, Dr. Scott Stacy, among others, evaluated Bodenstab and authored a Multidisciplinary Assessment, (Def. St., Ex. 8). During the evaluation process, Bodenstab admitted to Stacy at the very least to the content of his conversation with Wengeler. Bodenstab explained to Stacy that he was attempting to "push her buttons" because he was angry with her for refusing to help care for him after he had cared for her during her recovery from cancer. (Def. St., Ex. 8 at 3; Stacy Dep, at 58-59).

After the evaluation process, Stacy concluded that Bodenstab suffered from a Mood Disorder and a Psychotic Disorder and that at the time he was impaired and unable to practice medicine with skill and safety. (Def. St., Ex. 8 at 4-5). Stacy also concluded that the probability that Bodenstab was an active danger to himself or others was low. (Def. St., Ex. 8 at 5). Nevertheless, Stacy concluded that "without proper medication and intensive, supportive therapeutic intervention" Bodenstab would not be able to recover from his psychiatric symptoms, and recommended he

enter an intensive day or residential treatment program. (Def. St., Ex. 8 at 5).

After receiving the PRC's multidisciplinary assessment, the Hospital informed Bodenstab that based on the PRC's multidisciplinary assessment it was lifting his paid suspension, but not immediately returning him to work. (Pl. St., Ex. 109). The Hospital then informed Bodenstab that he may not return to work without prior approval from Lacy Thomas, the Hospital Director. (Pl. St. P 12). Choosing to use vacation and sick leave, Bodenstab voluntarily entered the PRC's intensive day treatment program, where he spent three months. (Def. St., Ex. 19, Pl. St. P 11).

Over the course of the treatment program, Bodenstab engaged in psychotherapy with PRC personnel, underwent psychological testing, and participated in group therapy. (Def. St., Ex, 19). During Bodenstab's treatment, the PRC treatment team observed that he had "a tendency to shift into a highly defensive, idiosyncratic, and intimidating mode of interpersonal relatedness" whenever he perceived others to be mistreating him. (Def. St., Ex. 19 at 2). Throughout treatment, Bodenstab continued his effort to convince PRC staff of his explanation of his conversation with Wengeler. At one point, Bodenstab wrote Stacy a memo explaining his conversation with Wengeler. (Pl. St. P 9). Bodenstab explained he used conditional syllogisms to push Wengeler's buttons and vent his anger towards her because she had not offered to come to Chicago to care for him. (Pl. St., Ex 153). In the memo, Bodenstab goes out of his way to lash out at Wengeler, disparaging her character in an apparent effort to make her seem uncredible. (Pl. St., Ex. 153). [2]

At the conclusion of his treatment program, Bodenstab requested an independent evaluation of his psychological functioning. (Def. St., Ex. 19 at 4). Dr. Kostas Katsavdakis administered a battery of psychological tests and reported that he suspected Bodenstab had searched the internet so that he could provide "normal" answers to Rorschach protocol; a suspicion which the PRC included in its report. (Def. St., Ex. 19 at 4).

After Bodenstab completed the treatment program and independent evaluation, Stacy authored a discharge summary sharing the PRC staff's conclusions. Among other things, the treatment team concluded that Bodenstab's ability to remain clear minded would become compromised by strong feelings when issues related to the Hospital emerged and that "his thinking would become highly personalized, over-elaborative, and rigid." (Def. St., Ex. 19 at 3). The team believed that "his vulnerability to be disruptive under certain highly charged political contexts could possibly lead to compromised patient care" and that he remained "a bit unsteady when faced with issues associated with Cook County Hospital." (Def. St., Ex. 19 at 3). The team concluded, however, that "in the absence of having dealings with Cook County Hospital, [it] did not have significant concerns about his ability to practice medicine with skill and safety." (Def. St., Ex. 19 at 3).

Upon his discharge, Bodenstab desired to return to the Hospital. In November 2002, Dr. Patricia Bush, an employee health service physician at the Hospital, signed a disposition form referring Bodenstab to the medical director but indicating "return to work with restriction" (Pl. St., Ex. 60/3). Bush testified that she listed no restrictions to protect Bodenstab's privacy

and allow his personal psychiatrist to assess any necessary restrictions. (Bush Dep. at 48-51). A few days later, Bodenstab met with Dr. Deerpak Kapoor, a psychiatrist at the Hospital. (Def. St. 37), Kapoor ended the interview abruptly because he felt Bodenstab's paranoia was escalating and because he feared for his safety. (Kapoor Dep. at 152-53). Kapoor concurred with the PRC's conclusion that Bodenstab was not capable of handling an emotionally-charged environment. (Kapoor Dep. at 111-116). After the meeting, Kapoor spoke with Bush and Langer and informed them that he believed Bodenstab was still paranoid and angry and would not "be able to handle an emotionally-charged situation, which he was going to get if he goes back to work." (Kapoor Dep. at 118-119).

Despite the less-than-favorable meeting with Kapoor, Bodenstab wrote to Langer requesting that the Hospital allow him to return to work. (Pl. St. P 21). Later in December, Bodenstab wrote to Thomas, again attempting an explanation of his conversation with Wengeler. (Pl. St. Ex 57; Def. St. Ex 13). In the letter Bodenstab insists that he has operated at all times with a rational mind and avers that nothing limits his ability to perform his job. (Pl. St., Ex. 57; Def. St. Ex. 13).

Despite Bodenstab's letter, Langer responded in writing, informing Bodenstab that the Hospital had scheduled a pre-disciplinary hearing in February at which the Hospital would charge Bodenstab with threatening to kill his former Department Chairperson and several co-workers. (Def. St., Ex. 12). Langer discussed the FBI and Chicago Police investigations as well as Bodenstab's treatment at the PRC. (Def. St., Ex. 12). Finally, Langer informed Bodenstab that the reports of the PRC and Kapoor led the Hospital to

believe that he posed a direct threat to the health and safety of other individuals in the workplace, and therefore refused to allow Bodenstab to return to work prior to the hearing. (Def. St., Ex. 12).

The Hospital gave Bodenstab a pre-disciplinary hearing, at which he was represented by counsel. (Def. St. P 45). After the hearing, the State's Attorney's Office wrote Cook County Board President John Stroger and informed him that Thomas and Steve Klem, a consultant for Cook County's Bureau of Health Services, recommended that the Hospital terminate Bodenstab. (Def. St., Ex. 27). In October 2003, the Hospital terminated Bodenstab. (Def. St., Ex. 18 at 2).

Bodenstab filed a grievance regarding his termination. (Def. St., Ex. 18). At one point during a subsequent grievance hearing, Bodenstab explained that when the Hospital sent him to the PRC, he "wouldn't cooperate with him . . . [and that he] prostituted their evaluation . . . [and] pissed the County's $ 5,000 down the sewer because they violated the law." (Def. St., Ex. 17 at 107). The hearing officer concurred with the Hospital's decision to "not to chance placing [Bodenstab's] co-workers in harms way by returning him to work and to discharge Bodenstab based on the recommendations in the report from the PRC." (Def. St., Ex. 18 at 4, 6). The hearing officer denied Bodenstab's appeal. (Def. St., Ex, 18 at 6).

II. Standard of Review

When deciding a motion for summary judgment, a court must view the record and all inferences drawn from it in the light most favorable to the non-moving party, *Keri v. Bd. of Trustees of Purdue Univ.*, 458 F.3d 620,

628 (7th Cir. 2006). A court, however, must draw these inferences from the specific facts in the record. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922-23 (7th Cir.1994). Conclusory allegations are insufficient to defeat a motion for summary judgment. *Keri*, 458 F.3d at 628. The rules governing summary judgment apply when the parties file cross-motions. *Cont'l Cas. Co. v. Northwestern Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir.2005). A court's role on summary judgment is not to determine the truth or test the credibility of the witnesses, but to determine whether there is a genuine issue of triable fact.

III. ADA Claims

Although Bodenstab's Third Amended Complaint contains only one count pursuant to the ADA, the Complaint actually contains three distinct claims under the ADA, First, Bodenstab alleges that the Hospital failed to make a reasonable accommodation for a perceived disability. Second, Bodenstab alleges that the Hospital discriminated against him on the basis of a perceived disability. Finally, Bodenstab alleges that the Hospital retaliated against him for protesting discriminatory conduct. The Court will examine each claim in turn.

A. Failure to Accommodate

To succeed on his failure-to-accommodate claim under the ADA, Bodenstab must show (1) that he is a qualified individual with a disability; (2) the Hospital was aware of that disability; and (3) the Hospital failed to reasonably accommodate the disability, *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir.2005). In order to show that he was disabled, Bodenstab must

show either (1) that he has a "physical or mental impairment that substantially limits [him in] one or more major life activities"; (2) that he "has a record of such an impairment"; or (3) that the employer "regarded [him] as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). Further, the employment provisions of the ADA only protect qualified individuals with disabilities; those individuals who, with or without a reasonable accommodation, can perform the essential functions of their position, *See* 42 U.S.C. § 12111(8); *Miller v. Ill. Dep't of Corr.*, 107 F.3d 483, 485 (7th Cir.1997).

The Hospital argues both that Bodenstab is not disabled within the meaning of the ADA and that, even if he is, that he is not a qualified individual with a disability. Both arguments would also defeat his disparate treatment claim because demonstrating that Bodenstab is a qualified individual with a disability is also the first element of that claim. *See Cassimy v. Board of Educ. of Rockford Public Sch., Dist. No. 205*, 461 F.3d 932, 935-36 (7th Cir. 2006).

The Hospital argues that Bodenstab is not a qualified individual within the meaning of the ADA because he sabotaged the PRC's evaluation process. The undisputed facts demonstrate that an independent psychiatrist, performing an evaluation at the end of Bodenstab's treatment program, suspected Bodenstab of looking up answers to the Rorschach inkblot test on the internet to skew the results of his test. Bodenstab himself testified that he "prostituted" the PRC's evaluation and "pissed away" the money the Hospital spent on the diagnosis by deliberately giving incorrect answers and by refusing to take his medication. Throughout the evaluative process, it is undisputed

that Bodenstab remained belligerent and uncooperative. While these facts are undisputed, they are not material. That Bodenstab may have sabotaged efforts to diagnose him (and not, significantly, to treat him) does not speak to the issue of whether he can perform his job with a reasonable accommodation.

The Hospital cites several cases for the proposition that an Bodenstab's failure to cooperate with an evaluative process doom his ADA claims. None of the cases cited by the Hospital are convincing. In one, the plaintiff refused several reasonable accommodations and insisted that the defendant accommodate her in the way she desired. *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236, 1238-39 (7th Cir. 1998). While *Webster* certainly stands for the proposition that a plaintiff may not request a specific accommodations, it does not stand for the proposition that an employee who does not cooperate in an evaluative process loses the right to a reasonable accommodation entirely. *Id.* In another case cited by the Hospital, an FMLA-claimant failed to appear at a medical examination requested by the Hospital pursuant to 29 U.S.C. § 2613(c). *Diaz v. Fort Wayne Foundry Inc.*, 131 F.3d 711, 713 (7th Cir. 1997). But the FMLA explicitly requires employees filing claims to substantiate their serious health condition and allows employers to get a second opinion prior to paying benefits, and accordingly places that decision in a much different context than a failure to accommodate claim. The Court holds that the Hospital is not entitled to summary judgment on Bodenstab's ADA claims merely because Bodenstab did not cooperate with an evaluative treatment program.

The Hospital next argues that Bodenstab is not a "qualified individual" because he posed a direct threat to the health or safety of other individuals in the work place. Based largely on the alleged threats Bodenstab made, the Hospital argues that Bodenstab is not a qualified individual with a disability because he posed a direct threat to Hospital co-workers and patients, Under the ADA, it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself or others, 42 U.S.C. § 12113(a), (b); *Borgialli v. Thunder Basin Coal Co.*, 235 F. 3d 1284, 1290-91 (7th Cir. 2000). When evaluating whether an employee poses a direct threat, courts are to make an individualized assessment of an individuals ability to safely perform the essential functions of the job. *See Borgialli*, 235 F.3d at 1291 (listing factors to consider).

The ADA does not require employers to take unnecessary risks when dealing with mentally or physically impaired employees. *See Emerson v. Northern States Power Co.*, 256 F.3d 506, 514-15 (7th Cir. 2001); *Borgialli*, 235 F.3d at 1294-95. In *Borgialli*, the court held that an employee who harbored a grudge against a supervisor and who threatened suicide and injury to others did pose a direct threat to others. *Borgialli*, 235 F.3d at 1294-95. In *Borgialli* two independent medical opinions supported the employer's conclusion that the plaintiff posed a direct threat to the safety of others, and the plaintiff had refused to assent to a third medical opinion. *Id.*

The facts are similar here. The Hospital points to the alleged threats regarding his coworkers that Bodenstab made, FBI and police investigations, the PRC discharge summary that suggests that Bodenstab's

"vulnerability to be disruptive under certain highly charged political contexts could possibly lead to compromised patient care," and Kapoor's finding that Bodenstab "wouldn't be able to handle an emotionally-charged situation" at the Hospital. Although the record contains the opinion of a medical expert, one retained by Bodenstab, that Bodenstab posed a low degree of risk to his coworkers, this evidence was not available to the Hospital at the time it made its decision to terminate Bodenstab. (Oblosky Dep. at 78).

The Hospital knew only that it had an employee who had made a phone call that had prompted both FBI and police investigations and that an independent medical examination had determined that his potential to be disruptive could possibly compromise patient care. The PRC discharge report noted that Bodenstab became compromised by strong feelings and could not remain "clear minded" when issues related to the Hospital arose. The discharge report further noted that in these situations, "his thinking would become highly personalized, over-elaborative, and rigid," and that "his vulnerability to be disruptive under certain highly charged political contexts could possibly lead to compromised patient care." *See* Def. St., Ex. 19. While Bodenstab continues to insist that he never intended the comments he made to Wengeler to be construed as a threat and that the Hospital is mistaken in its belief, it is not the Court's role to reevaluate personnel decisions made by the Hospital to determine if the Court would have arrived at a different conclusion. The Hospital's decision that Bodenstab posed a direct threat is supported by FBI and police investigations and independent medical opinions.

But even if the Hospital could not demonstrate that Bodenstab posed a direct threat, it still could prevail on summary judgment because Bodenstab does not have an impairment that substantially limits him in one or more major life activities, and therefore is not disabled within the meaning of the ADA. *See Squibb v. Memorial Medical Ctr.*, 497 F.3d 775, 780-81 (7th Cir. 2007); *Rooney v. Koch Air, LLC*, 410 F.3d 376, 380-81 (7th Cir. 2005). The Hospital admits that Bodenstab had a mental impairment, but argues that it does not substantially limit a major life activity -- such as working.

In support, the Hospital points to the PRC's discharge summary, which comments that Bodenstab is fit to practice medicine with skill and safety but that he is a bit unsteady when faced with issues associated with the Hospital. *See* Def. St., Ex. 19, In other words, the Hospital argues that Bodenstab is not disabled merely because his mental disability creates conflict with Hospital personnel and thus substantially limits his ability to work at one particular hospital. *See Squibb*, 497 F.3d at 782; *Rooney*, 410 F.3d at 381; 29 C.F.R. § 1630.2(j)(3)(i) (inability to perform one particular job does not constitute a substantial limitation in the major life activity of working). The Seventh Circuit has held that personality conflicts -- even when they produce anxiety or depression -- are not disabling. *See Palmer v. Circuit Court of Cook County*, 117 F.3d 351, 352 (7th Cir. 1997). If Bodenstab's personality conflict triggers a serious mental illness that is itself disabling, then it might qualify as a disability. *Id.* Bodenstab's illness, however, interferes only with his ability to work at one particular Hospital, and not as an anesthesiologist

generally, and thus, is not substantially limited with regard to the major life activity of working,

In response, Bodenstab suggests that the Hospital regarded him as being disabled. *See Squibb*, 497 F.3d at 786. In support, Bodenstab points to a January 17, 2003, letter sent to him by Langer, summarizing the charges Bodenstab would have to answer in his disciplinary hearing. Bodenstab highlights Langer's reference to the PRC's September 2002 conclusion that "the assessment team finds Dr. Bodenstab to be impaired at this time and therefore unable to practice medicine with skill and safety." *See* Def. Ex. 12. Langer, however, refers to the PRC's September conclusion not to assert the Hospital's belief that he was not capable of practicing medicine, but to explain the Hospital's decision to terminate his paid suspension at that time and allow Bodenstab to take leave to enter the PRC treatment program. Langer later references the PRC's discharge report, in which it recommended that Bodenstab not return to work in an emotionally or politically charged environment, such as the Hospital. The Court holds that the September 17 letter from Langer does not create a genuine issue of material fact as to whether the Hospital regarded Bodenstab as disabled.

Accordingly, the Court holds that Bodenstab did not have an impairment that substantially limited a major life activity, and therefore he is not disabled within the meaning of the ADA.

B. Disparate Treatment

The ADA prohibits employers from discriminating against qualified individuals because of their

disabilities. 42 U.S.C. § 12112(a). As noted earlier, the Court's ruling that Bodenstab is not disabled within the meaning of the ADA defeats his disparate treatment claim as well. Even if it did not, the Court would still grant summary judgment in favor of the Hospital.

As in other disparate treatment cases, a plaintiff pursuing an ADA disparate treatment claim may proceed under the direct method or the burden-shifting method articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green. Timmons v. General Motors Corp.*, 469 F.3d 1122, 1126 (7th Cir. 2006). Under the direct method, a plaintiff can use either direct or circumstantial evidence that points to a discriminatory motive for the employer's actions. *Id.* Bodenstab appears to make an argument under the direct method but produces, at best, only a skeletal argument that a convincing mosaic of evidence supporting an inference of discrimination exists. In constructing this argument, Bodenstab cites no authority. Instead, he merely lists 16 separate pieces of evidence (most of which contain no reference to the record) without any sort of explanation.

For example, Bodenstab mentions Langer's 2003 suspension letter and Thomas's 2003 termination letter, both of which reference the findings of the PRC, but never explains how a fact-finder might construe either letter to be circumstantial evidence of the Hospital's discriminatory motive. In a similar vein, Bodenstab repeatedly refers to the Hospital's alleged failure to follow an internal policy or to confer with him about his call to Wengeler or the PRC reports without identifying why such facts point to a discriminatory motive. Other pieces of evidence merely reflect Bodenstab's opinion: his claim, for instance, that

Langer and Thomas exaggerated their perception of the threat posed by Bodenstab or his claim that Langer "feigned" an inability to remember certain conversations.

In the end, what is left are the pieces of an unsolved jig saw puzzle, unceremoniously dumped onto the Court's bench. Bodenstab makes no effort to demonstrate how the pieces fit together or how they resemble the pieces of other puzzles where a court found evidence to support an inference of discrimination. In the end, it is not the Court's job to put together the pieces of the puzzle -- that is counsel's. *330 West Hubbard Restaurant Corp. v. United States*, 203 F.3d 990, 997 (7th Cir. 2000) ("in order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate to raise a basis for appeal."); *Corley v. Rosewood Care Center, Inc. Of Peoria*, 388 F.3d 990, 1006-07 (7th Cir. 2004) (it is not the court's obligation to conduct legal research necessary to construct an argument from set of facts); *Depauw v. Ingersoll-Rand*, No 06 C 1161, 2007 U.S. Dist. LEXIS 75249, 2007 WL2955576, at *8 (C.D. Ill. Oct. 10, 2007) (pointing to two individuals and expecting court to construct an argument that those two individuals are similarly situated is insufficient).

Under the indirect method, plaintiffs must first make a *prima facie* showing of discrimination, which requires a plaintiff to point to evidence demonstrating that he is disabled within the meaning of the ADA, that he was meeting his employers legitimate business expectations, that he suffered an adverse employment action, and that similarly situated employees were treated more favorably. *Kampmier v. Emritus Corp.*,

472 F.3d 930, 937 (7th Cir. 2007); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922 (7th Cir. 2001). Sometimes a plaintiff cannot point to similarly situated employees, in which case a plaintiff can survive summary judgment by pointing to circumstances surrounding the adverse employment action that show it is more likely than not that the disability was the reason for the employer's action. *Timmons*, 469 F.3d at 1126. Once a plaintiff has made a *prima facie* showing, the employer must point to a non-discriminatory reason for its action, which the plaintiff must demonstrate to be pretextual in order to survive summary judgment. *Id.* In order to demonstrate that a reason is pretextual, Bodenstab must show either that the Hospital's reason had no basis in fact, it did not actually motivate the Hospital's decision, or that it was insufficient to motivate that decision. *Forrester v. Rauland-Borg. Corp.*, 453 F.3d 416, 418 (7th Cir. 2006).

In this case, the Hospital again points to Bodenstab's call to Wengeler, which triggered a Chicago Police and FBI investigation into Bodenstab's alleged threats, and the PRC discharge summary. Bodenstab argues that the Hospital could not possibly have believed that he posed a threat based on the "testimony of all witnesses," without further elaboration. Bodenstab also points out that the staff at PRC concluded that his threats were merely "angry fantasies." But Bodenstab does not accurately characterize the findings of the PRC. The Diagnostic Assessment never concluded that the threats Bodenstab made to Wengeler were merely angry fantasies. Instead, it merely reported that Bodenstab himself described them that way. (See Def. St., Ex. 8 at 3). In any event, Bodenstab also mischaracterizes both the law and the Hospital's

argument. It does not matter that the threats he made to Wengeler might have been misinterpreted or that the Hospital was wrong to believe that he made them. *Merillat v. Metal Spinners Inc.*, 470 F.3d 685, 693 (7th Cir. 2006); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 696 (7th Cir. 2006). Instead, the sole question for the Court is whether the Hospital honestly believed that Bodenstab had threatened his employees or whether the Hospital honestly believed the recommendations in the PRC discharge summary necessitated his termination.

In this case, the police and the FBI investigated the threats and conferred with Hospital personnel. A diagnostic assessment made by independent psychiatrists stated that Bodenstab admitted to having made the threats. Finally, the PRC's discharge summary (which the Hospital's psychiatrist, Kapoor, concurred with) noted that Bodenstab had a tendency to be "disruptive under certain highly charged political contexts [which] could possibly lead to compromised patient care."

Bodenstab cannot show that these reasons had no basis in fact. Further, Bodenstab has pointed to no evidence to suggest that the Hospital did not honestly believe that the Police and FBI were investigating a credible threat or that the assessment of the PRC that his tendency to be disruptive could lead to compromised patient care. *See Crim v. Board of Educ. of Cairo Sch. Dist. No. 1*, 147 F.3d 535, 541-42 (7th Cir. 1998) (plaintiff must demonstrate that all of the employer's reasons are pretextual). Thus, he cannot demonstrate that these reasons did not actually motivate his discharge. Finally, he does not suggest (nor could he reasonably do so) that alleged death threats to employees or potentially

compromised patient care are insufficient reasons to discharge him. *See, e.g., Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130 (7th Cir. 1994) (alleged death threat to co-worker sufficient to warrant discharge); *Palmer*, 117 F.3d at 352; *Smith v. Leggett Wire Co.*, 220 F.3d 752 (6th Cir. 2000).

C. Retaliation

In his Complaint, Bodenstab alleges that the Hospital retaliated against him for requesting an accommodation pursuant to the ADA and for his opposition to perceived discrimination that violated the ADA. (Def. St., Ex. 1 at 6). Bodenstab does little to elaborate on these allegations in either of his briefs, claiming only that he engaged in protected expression when he wrote to Thomas requesting that Thomas return him to work. (Pl. St., Ex. 57). Bodenstab's letter, however, does not request an accommodation or protest the Hospital's discriminatory practices. Instead, it rambles through six pages of reasons why he believes he should return to work. Almost in its entirety, the letter constitutes a discussion of his conversation with Wengeler, an explanation of Bodenstab's personal belief that his "conditional syllogism" did not constitute a threat, and a defense of his position that he does not pose a threat to himself or others. The letter does not refer to a practice made unlawful by the ADA. Instead, Bodenstab argues that he operated at all times with a clear an rational mind, devoid of any limitation that would impact his ability to perform his job. Nor does he ever request an accommodation, and instead urges the Hospital to return him to work without limitation, directly disavowing any notion that he might have been disabled. Moreover, even if the Court were to construe

Bodenstab's letter as "protected activity," he sent the letter *after* the Hospital had already initiated disciplinary proceedings against him.

Bodenstab did not engage in protected activity, and therefore his retaliation claim fails.

IV. Section 1983 Claim

Bodenstab includes a variety of claims under 42 U.S.C. § 1983, none of which have merit. These claims require little discussion.

For instance, Bodenstab claims that the Hospital and individual Defendants treated him differently than other similarly situated employees, thereby creating a "class of one." The Seventh Circuit has rejected similar claims, holding that to bring a "class of one" claim a plaintiff must demonstrate that there is no reasonably conceivable state of facts that could provide a rational basis for the classification. *Lauth v. McCollum*, 424 F. 3d 631 (7th Cir. 2005). That is not the case here, as the police and FBI investigations into Bodenstab's conversation with Wengeler and the subsequent discharge report from the PRC more provide such a rational basis.

Bodenstab also claims that the Hospital violated his Fourth and Fourteenth Amendment rights when it required him to sign an authorization for a psychiatric evaluation. This argument is frivolous. At the time the Hospital required the evaluations, both the Chicago Police and the FBI had contacted it regarding alleged death threats made by Bodenstab against members of the staff. The Hospital would have been grossly negligent to ignore such threats. The ADA allows employers to inquire into an employee's medical

condition when such inquiry is job-related or a business necessity. *See* 42 U.S.C. § 12112(d)(4); *Krocka v. City of Chicago*, 203 F. 3d 507, 515 (7th Cir. 2000).

Bodenstab next claims that the Hospital deprived him of both substantive and procedural due process rights by terminating his employment. [3] Under *Cleveland Board of Education v. Loudermill*, an employee with a property interest in his job who also has an adequate post-deprivation remedy must only be given a pre-suspension hearing that includes notice of the charges, an explanation of the employer's evidence, and the opportunity for the employee to present his own evidence. 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 494 (1985); *see also Salas v. Wis. Dep't of Corrections*, 493 F.3d 913, 927 (7th Cir. 2007).

The Hospital afforded Bodenstab these pre-deprivation procedural rights: informing him by letter of the nature of the charges against him and nature of the Hospital's evidence and providing him with a pre-suspension hearing at which Bodenstab's counsel presented his side of the story. The Hospital also provided Bodenstab with a post-suspension hearing before an independent hearing officer at which he was represented by counsel, presented witnesses, was permitted to testify, was permitted to cross-examine the Hospital's witnesses, and introduced exhibits. Nothing more is required. *See Salas*, 493 F.3d at 927; *see also Belcher v. Norton*, 497 F.3d 742, 751-52 (7th Cir. 2007). [4]

Lastly, Bodenstab claims the Hospital violated his right to free speech by terminating him for calling attention to "ghost surgeries" and other purportedly illegal activities at the Hospital. Bodenstab's speech in this

regard is not protected at all. Bodenstab made several internal complaints, mostly regarding Winnie (the doctor Wengeler believed Bodenstab intended to kill), and as such are not public speech at all. Further, even if Bodenstab's speech were protected, his complaints occurred either four or more years prior to the disciplinary proceedings that led to his termination or after the proceedings were initiated. [5]

Accordingly, the Court GRANTS the Hospital's motion for summary judgment on Bodenstab's § 1983 claims.

V. Declaratory Judgment [6]

Bodenstab asks the Court to declare that the Hospital should not have disciplined him under the Cook County Hospital Policy Manual Governing Employee Conduct, but under the Hospital Medical Staff Bylaws. The former governs the conduct of Hospital employees, while the latter governs a practitioner's (who may or may not be employed by the Hospital) privilege to practice at the Hospital. *See generally, Applebaum v. Garibaldi*, 194 Ill.2d 438, 742 N.E2d 279, 252 Ill. Dec. 29 (Ill. 2000).

Bodenstab also asks the Court to declare that the PRC's records was procured contrary to law, This claim, however, is frivolous. As noted earlier, the Hospital had every right to require Bodenstab to undergo a psychiatric evaluation.

VI. Common Law Certiorari

In his final claim, Bodenstab asks the Court to review the administrative agency's determination and reverse its findings. The standard of review of agency's decision to discharge public employee is whether its findings of fact are contrary to manifest weight of

evidence and whether they provide sufficient basis for the decision that cause for discharge does or does not exist. *See, e.g., Starkey v. Civil Serv. Comm'n*, 97 Ill. 2d 91, 454 N.E.2d 265, 73 Ill. Dec. 405 (1983); *Finnerty v. Personnel Board of the City of Chicago*, 303 Ill. App. 3d 1, 707 N.E.2d 600, 236 Ill. Dec. 473 (1999),

There is more than ample evidence in the record, as recounted above, to support the administrative agency's findings of fact and its conclusion that those facts provide a sufficient basis for the Hospital's decision to discharge Bodenstab.

For the foregoing reasons, the Court GRANTS the Hospital's motion for summary judgment and DENIES Bodenstab's motion for summary judgment.

IT IS SO ORDERED.

1/28/08

Dated

/s/ William J. Hibbler

Hon. William J. Hibbler

United States District Court

Footnotes

1 In desperate attempts to minimize the damaging statements Bodenstab made to Wengeler, he points to other portions of her deposition, notably a portion of her deposition where she says that he also discussed marrying a 20-year-old "bimbo" in order to ensure that Cook County would pay retirement benefits long after he might die. *See* Wengeler Dep. at 48-58. These passages of Wengeler's deposition do nothing to

contradict her earlier statements. Bodenstab also points the Court to numerous exhibits that he believes to contradict Wengeler's deposition testimony. Bodenstab's reliance on these exhibits is misplaced. For example, he points to an affidavit that his counsel prepared for Wengeler to sign. Not only did Wengeler refuse to sign the affidavit, but instead made numerous additional written comments that suggest she did in fact consider Bodenstab's threats to be serious. *See* Pl. Ex. 161.

Bodenstab also suggests that Wengeler's deposition is hearsay. The Defendants offer it, however, not to demonstrate that Bodenstab actually made the death threats, but to demonstrate the effect of the words upon Ms. Wengeler -- namely that she promptly called both the police and the FBI. Moreover, Bodenstab himself admits making the statements that Wengeler testified he had made. (Bodenstab Dep. 90-92, 115-116).

Finally, Bodenstab suggests that Wengeler's deposition is "after-acquired" evidence and cannot be used by Defendants in their summary judgment motion. But Defendants do not use Wengeler's deposition testimony as evidence of their reasons for terminating Bodenstab; they instead use it to chronicle the series of events that led to his termination.

2 For example, in a section where Bodenstab describes Wengeler's characteristics, he states that she "has a flawed mental perception" and that she advocates non-violence "perhaps as a result of [her] recognition that she used physical violence to discipline her biracial bastard son during his development." (Pl. St., Ex. 153).

3 Bodenstab's substantive due process claim is cursory and undeveloped. He merely alleges that the Hospital

deprived him of "both a property interest and liberty interest," without further elaboration. The Court will not address this claim.

4 Bodenstab makes various arguments about the time-line regarding the administrative hearings, but any delays were caused by Bodenstab himself, who changed his mind about the type of hearing he desired, who changed law firms several times during the process, who delayed the psychiatric evaluation by refusing to see the Hospital's psychiatrist and then by negotiating through his attorneys the terms of the evaluation, whose attorneys requested delays because they could not contact Bodenstab, and whose attorneys participated in settlement discussions.

5 For example, in 1998 Bodenstab wrote to the peer review committee regarding allegations that Winnie performed ghost surgeries. (Bodenstab Dep. at 93-95). In 1993, Bodenstab complained, internally, that another doctor had abandoned a patient in the operating room. (Bodenstab Dep. at 148-149). Bodenstab again complained to the peer review committee about Winnie in 2003. (Bodenstab Dep. at 156-57).

6 Although 28 U.S.C. § 2201 *et seq* does not serve as an independent basis for jurisdiction, under 28 U.S.C. § 1367(c) does not require the Court to dismiss pendant state claims when the Court has dismissed all claims over which it had original jurisdiction, *See Williams Elec. Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir.2007). It is obvious how these claims should be decided, and the Court will address them briefly.

No. 08-1450

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PHILIP C. BODENSTAB, M.D.,
Plaintiff-Appellant,
v.
COUNTY OF COOK, LACY L. THOMAS, and BRADLEY LANGER, M.D., Defendants-Appellees.

7/16/2009

Before EASTERBROOK, Chief Judge, and FLAUM and MANION, Circuit Judges.

ORDER

On consideration of the petition for rehearing en banc filed by plaintiff-appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

11/3/05

RE: DISCHARGE APPEAL HEARING FOR PHILIP C. BODENSTAB, M.D.
IN ATTENDANCE:

GRIEVANT: PHILIP C. BODENSTAB, M.D.

MANAGEMENT: BRADLEY LANGER, M.D.
INTERIM MEDICAL DIRECTOR - DEPARTMENT OF MEDICAL ADMINISTRATION

JOHN H. STROGER, JR. HOSPITAL OF COOK COUNTY

LISA M. MEADOR, ESQ.
PATRICK M. BLANCHARD, ESQ.

ASSISTANT STATE'S ATTORNEYS OF COOK COUNTY

ATTORNEY: GLENN R. GAFFNEY, ESQ.
LAW OFFICE OF GAFFNEY & GAFFNEY

ISSUE:

Although several issues had been raised, the principal issue for decisioN herein is whether management had sufficient ground for justifiably terminating the Grievant from his Position as a Doctor of Anesthesiology at Stroger Hospital of Cook County, Its reasons on were based on recommendations contained in a report drafted by personnel at the Professional Renewal Center ("PRC") of Lawrence, Kansas.

RELIEF SOUGHT:

That the Grievant be reinstated to his position as an anesthetist in the Hospital's Department of Anesthesiology/Pain Management.

FINDING: .

Based on the information obtained during the third step hearing, the notes taken by this Hearing Officer and based on a review of all materials available this Discharge Appeal must be DENIED. This ruling is further explained below.

INTRODUCTORY STATEMENT:

Sometime in February, 2002, Management was advised by the Federal Bureau of Investigations ("FBI") and the Chicago Police Department ("CPD") of an investigation being conducted into what they termed were "credible allegations" that Philip C. Bodenstab, Grievant herein, had made threats to kill several physicians at Stroger Hospital and then commit suicide at the hands of the police in pursuing these allegations, the Grievant was interviewed by the FBI and during that interview he denied making any such threats against anyone. Subsequent to the conduct of the investigation by law enforcement personnel, he was suspended and a request was made by Management for the Grievant to submit to a psychiatric evaluation. As a result of the final. report provided after several evaluations were conducted, Management executed a pre-disciplinary hearing and subsequently terminated the Grievant's employment at the Hospital.

BACKGROUND

Management learned on or about February 24, 2002 that the FBI had received what they considered "credible allegations" that the Grievant allegedly threatened to kill several physicians at the Hospital and then commit suicide at the hands of the police. After being interviewed by law enforcement officials, Management administratively suspended the Grievant, with pay, and asked him to submit to a psychiatric evaluation during the pendency of that suspension. The evaluation(s) were conducted by personnel of the Professional Renewal Center ("PRC") in Lawrence, Kansas. After conducting several evaluation(s) staff of the PRC submitted their report to Management. In that report they opined that the Grievant could return to work as a physician but that he ought not to be returned to an atmosphere "that is emotionally, politically, or personally charged... as such an environment would strain his ability to work with others in a consensual and cooperative manner." (Report from the Professional Renewal Center report entitled "Multi disciplinary Assessment; Diagnostic Impressions, dated November 20, 2002).

After receiving a copy o that Report and after several postponements of selected dates for a pre-disciplinary hearing, Management conducted that hearing on May 12, 2003. This hearing looked into the allegations of misconduct by the Grievant. After continued conferences between the parties involved and upon further consultation with the Hospital's own Director of Psychiatry, Management terminated the Grievant's employment effective October 28, 2003. Because the discipline was outright discharge, the Grievant was

entitled to bypass the first and second steps of the County's grievance process. Initially, there was some confusion as to haw the Grievant would proceed. Shortly thereafter, the Grievant, through counsel, determined that because the Grievant's discharge should not have been made pursuant to the County's Personnel Rules but rather the Bylaws of the Medical Staff, a decision was made that he would proceed, de novo, in the Circuit Court of Cook County and not the basis of certiorari. Later, with the addition of new counsel for the Grievant tactics were changed and a decision made to proceed first with the third step hearing to complete the administrative process.

MANAGEMENT'S RATIONALE FOR DISCHARGING THE GRIEVANT

At the hearing, Management was represented by Dr. Bradley Langer, Interim Director of the Department of Medical Administration, Stroger Hospital and by Lisa M. Meador and Patrick Balnchard, Assistant State's Attorneys of Cook County. Dr. Langer presented Management's rationale for its actions to the parties present at the hearing. He stated, as indicated above, that Management had been notified by members of the Federal Bureau of Investigation and the Chicago Police Department that they had received "credible allegations" that the Grievant intended to kill several physicians at the Hospital and then commit suicide at the hands of the police. Accordingly; these officials indicated that their wanted to conduct an interview with the Grievant. During that interview, the Grievant denied having made any such threats against anyone.

Regardless, Management was concerned that such

threats, even though denied, could have been made by the Grievant and it suspended him pending his submission to a psychiatric evaluation. Eventually, both parties, through respective counsel, agreed that the Grievant would be evaluated at the Professional Renewal Center located in Lawrence, Kansas. After spending several weeks at that facility the staff rude some recommendations regarding the Grievant and his ability to return to work. That Staff concluded that the Grievant could return to work but that he should not return to an "emotionally, politically or personally charged environment" in which he had worked prior to his suspension since they felt that the Grievant would be unable to work in a "consensual and cooperative manner". Based on the opinions presented by staff at the Center, Management determined that it could not jeopardize other Hospital employees who might be in harms way so it felt that termination was the most appropriate route to take.

Insuring that the Grievant's due process rights were not abridged, Management notified him that it would conduct a pre-disciplinary hearing relative to the information it received from the Professional Renewal Center and other allegations made. Upon conclusion of that hearing Management determined that is would be wiser to err on the side of caution and it discharged the Grievant.

THE GRIEVANT'S RESPONSE TO MANAGEMENT'S RATIONALE

At the hearing, the Grievant was represented by Mr. Glenn Gaffney, an attorney with the Law Offices of Gaffny and Gaffney. The gist of the Grievant's

contention, inter alia, was that he should not have been discharge for something that was false and, alternatively, had been [done] not on Hospital grounds but in the privacy of his residence. Additionally, the Grievant argued that he had been cleared to return to work by a physician at the Hospital's Employee Health Service, and that that disposition took precedence over any other recommendations that may have been made. Alternatively, the Grievant contended that his discharge was in violation of the "Bylaws of the Medical Staff of Cook County Hospital (now know as the John H. Stroger, Jr. Hospital. of Cook County) drafted on October 29, 1991.

Although a myriad of issues were presented by the Grievant, the most important ones appeared to be whether the Grievant could return to work pursuant to a disposition form provided by the Hospital's EHS physician and that because the incident happened off campus it could not be construed as a "major cause" infraction or anything else far that ratter. In contending that he had been cleared by the Hospital's EHS service, the Grievant pointed to the recommendation portion of that form which indicated that he could "return to work with restrictions". Citing County procedural rules, the Grievant indicated that that document directed Management to return the Grievant to his position as a Doctor of Anesthesiology at the Hospital and it could not be contravened by anyone or anything.

Through counsel, the Grievant related the events surrounding the purported conversation that the Grievant had with a female friend on or about the evening of February 2, 2002. He provided copious

testimony regarding his telephone conversation but denied that he had made any threats against anyone at any time during that conversation. He opined that because he had made some inappropriate comments to that friend, as a result she fabricated the story that he confided with her his desire to kill several of his colleagues at the Hospital and then commit suicide at the hands of law enforcement officers.

The remainder of the Grievant's testimony centered about the events leading up to his pre-disciplinary hearing relative to the PRC reports, discussions with the Chief of the Psychiatry Department at Stroger Hospital and whether that physician made any recommendations to Dr. Langer regarding the Grievant's ability to return to work. (Note: Due to the narrow question presented at the third step hearing much of the other testimony presented by the Grievant will not be provided herein as it is deemed to be irrelevant to the central issue delineated above)

DECISION:

Based on the testimony of Management and the Grievant and upon a thorough review of the documents submitted, it i the conclusion of this Hearing Officer that the Grievant was justifiably discharged based on the recommendations made in a report by staff at the Professional Renewal Center and based on Management's appropriate desire not to chance placing the Grievant's co-workers in harms way by returning him to work. It is with that determination that I concur.

Initially, several post hearing motions were made by counsel for both parties involved in this matter. The

State's Attorney Office filed its "Motion To Strike portions of the Grievant's Exhibits at Discharge Appeal Hearing" contending, inter alia, that the exhibits contained more than "testimonial, demonstrative, and documentary evidence". Because the third step hearing is administrative in nature, the Hearing Officer's powers are limited and I don't believe that this Hearing officer has the power to strike any portions of any documents proffered, regardless. Moreover, none of the items contained in the Grievant's Exhibits were considered by this Hearing officer nor influenced the conclusions arrived at in this decision. Further, the State's Attorney contended that the Grievant previously "waived" his right to this third step administrative hearing having notified the State's Attorney's office of his desire to proceed in a different forum. This motion, too, will be denied as being moot since the administrative hearing has been held. Further, in the documents provided by the State's Attorney's Office there were briefs submitted in open court in which the State's Attorney argued that the Grievant ought not to be permitted to proceed in a different forum since he had not exhausted the administrative route. I concur with that fact since the third step administrative hearing terminates the administrative process.

Additionally, the Grievant's contention that he was improperly terminated because the administrative proceeding conducted at the pre-disciplinary level pursuant to Stroger Hospital Policy #06-10-27 was in contravention with the Hospital's Medical Staff Bylaws or Illinois Law is erroneous. Cook County is a home rule unit of local government pursuant to Article VII, par. 6(a) of the 1970 Illinois Constitution. Stroger

Hospital is a public hospital organized under the laws of the State of Illinois. The Cook County Board of Commissioners ("Cook County Board") is the governing body for the County of Cook and Stroger Hospital. That Board adopted the Cook County Medical Staff Bylaws on or about October 29, 1991. These Bylaws govern medical staff membership and clinical privileges at the Cook County health facilities only and not the disciplinary process.

Consequently, the Stroger Hospital Rules and Regulations Governing Employee Conduct (Policy #06-10-27) pertain to conduct affecting Hospital employee in their day to day employment behavior activities and are separate and distinct documents affecting the Hospital's physicians in different ways for different things.

Lastly, the Grievant's contention that the incident involving him occurred off Hospital grounds and in the privacy of his home also has no major bearing here since. there are arbitral decisions which have held that an employee's deeds, even if done off campus, are actionable if the activity could be construed as showing a "direct and demonstrable relationship between the particular conduct and the performance of the employee's job." (77 LA 19, GRIEVANCE GUIDE, 9th EDITION, BNA Editorial Staff, 1995). Nevertheless, because of the narrow issue to be determined herein this fact is irrelevant.

With respect to the central, narrow issue, then, before this Hearing Officer and as was stated above, the question to be decided here was whether Management had a justifiable reason or reasons to discharge the

Grievant. I conclude that it had. Whether the Grievant's friend in Seattle had an ax to grind and fabricated the story that the Grievant intended to kill of some of his co-workers and later commit suicide has no bearing on this case. Whether the Grievant admitted anything to the FBI agents and/or the Chicago Police or lied to them also has no bearing here either. Nor is the question whether the Grievant committed a "major cause" infraction play any role in this determination. This Hearing Officer was required simply to decide if Management could justify its conclusion to discharge the Grievant.

In reviewing the documents submitted at the third step hearing and reviewing the testimony provided therein, the only critical item which was relevant in this matter was the report submitted by staff from the Professional Renewal Center in Lawrence, Kansas. That report left no doubt but that even though the Grievant was deemed able to return to his duties as an anesthesiologist there was a question regarding the Grievant' s ability to work in a "situation that [was] emotionally, politically, or interpersonally charged [since] such an environment would likely strain his [the Grievant' s] ability to work with others in a consensual and cooperative manner." This comment was made by PRC staff within a reasonable degree of medical certainty, an acceptable legal standard within the industry.

Faced with those limitations, Management had no other choice but to discharge the Grievant. It would have been too risky to chance returning the Grievant to his previous position as a Doctor of Anesthesiology at Stroger Hospital an view of the recommendations and

observations made by PRC Staff. While no one could definitively foresee what actually would have happened had the Grievant been returned to his previous duties, the PRC staff conclusion that that environment would likely "strain his ability to work with others in a consensual and cooperative manner" left Management with no other choice. Management could not place the Grievant in a situation which could have resulted in the disruption of operations at Stroger Hospital and/or place his co-workers in harms way.

It is for the above reasons and analysis that the Grievant's Discharge Appeal is DENIED. Incorporated by reference are all papers, records, and documents submitted and accepted at the hearing.

Richard J. Krakowski, Esq
Hearing Officer